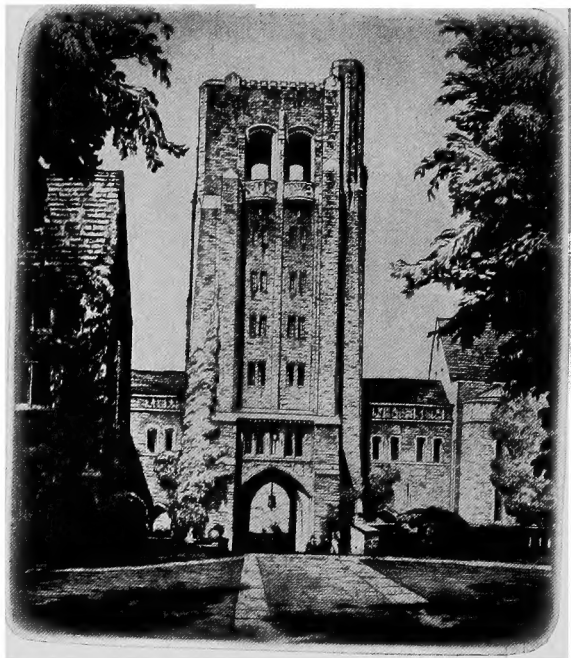


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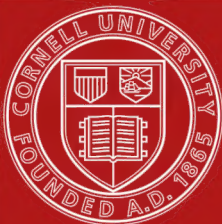
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NEGOTIABLE INSTRUMENTS LAW

FOR

COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, IDAHO, IOWA,
KENTUCKY, LOUISIANA, MASSACHUSETTS, MISSOURI, MONTANA, NEVADA,
NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA,
NORTH DAKOTA, OREGON, PENNSYLVANIA, TENNESSEE,
UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA,
WYOMING, ARIZONA, ILLINOIS, KANSAS, MARY-
LAND, MICHIGAN, NEBRASKA, NEW YORK,
OHIO, OKLAHOMA, RHODE ISLAND,
WISCONSIN.

BY

ARTHUR W. SELOVER, B. A., LL. M.
=

SECOND EDITION

BY

WILLIAM H. OPPENHEIMER.

ST. PAUL, MINN.
THE KEEFE-DAVIDSON COMPANY. NATIONAL LAW BOOK CO.
1910

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PREFACE.

The Uniform Negotiable Instrument Law is now in force in thirty-seven states and territories and in the District of Columbia, and has become such an important part of our commercial law as to warrant the publication of a general work on the subject. That this book might be of the most practical value to lawyers and others having occasion to refer to the Law, it has been deemed advisable to treat the subject analytically and to change considerably the arrangement as found in the Law and in the previous edition of this book. Also, there has been added in black letter type at the beginning of the treatment of each section the provision of the act in question or as much of it as is treated in that particular part of the work. This arrangement, coupled with the various tables and copy of the original draft of the Law found in the Appendix, it is hoped will prove not only convenient but of great practical benefit.

The Law has been before the courts in numerous cases and many important decisions have been rendered, and it is regretted that these have not been altogether uniform in their construction of the various provisions. Careful and systematic search has been made for all cases and it is believed that the present work contains all the published cases decided under the act up to March, 1910.

While primarily it has been sought to treat the Uniform Negotiable Instrument Law and its interpretation and construction, still there has been incorporated in the book the important omitted general rules of the Law Merchant which are still in force, and reference has repeatedly been made to the Law Merchant as an

aid to interpretation so as to show clearly the change made by the Law.

It is hoped that this combination of the Law and the rules of the Law Merchant, as well as the combination of annotated act and textbook style of treatment, will afford a practical textbook on the subject of negotiable instruments in those states which have adopted the Uniform Negotiable Instrument Law.

St. Paul, Minn., August, 26th, 1910.

WM. H. OPPENHEIMER.

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NEGOTIABLE INSTRUMENTS LAW

CHAPTER I.

GENERAL NATURE, SCOPE, AND APPLICATION OF THE NEGOTIABLE INSTRUMENTS LAWS.

- § 1. Nature and Purpose.
- § 2. Title of Laws.
- § 3. Application of Laws.
When Laws Take Effect.
- § 4. When Law Merchant Governs.
- § 5. Laws Repealed.

NATURE AND PURPOSE.

- § 1. **The Negotiable Instruments Law is primarily a codification of the rules of the law merchant.**

The national conference of commissioners on uniform state laws, a body composed of commissioners from twenty-nine states and two territories, submitted to the various legislatures and to congress a draft for a uniform law governing negotiable instruments. This draft, which is in substance a codification of the principles of the common law governing negotiable instruments,¹ has been adopted, with some modifications, in

¹ Union Stock Yards Nat. Bank v. Bolan, 14 Idaho, 87, 93 Pac. 508, 125 Am. St. Rep. 146; Parsons v. Utica Cement Co. (Conn.) 73 Atl. 785; Mackintosh v. Gibbs (N. J. Law) 74 Atl. 708.

thirty-seven states and in the District of Columbia.² It is such a matter of common knowledge as to make it proper for the courts to take judicial notice of the fact that the act was enacted because of an effort on the part of the bar of many, if not all, of the states of the union to bring about a uniform system of law respecting negotiable instruments.³ While as before stated, it was the evident purpose and intent of the framers of the statute to incorporate into it the provisions of the common law,⁴ still there follows the usual embarrassment which all codifiers encounter in framing a statute to meet all possible cases.⁵ The statute was, however, enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper,⁶ and, therefore, so far as it speaks without ambiguity as to any such question, reference to case law as it existed prior to its enactment is unnecessary and apt to be misleading.⁷ It is not merely a codification of existing rules, but makes some quite material⁸ changes,⁹ and hence the language of the act is not to be ignored because in some respects a change in the law is effected.¹⁰ If, however, a provision is doubtful or has a technical meaning, resort may be had to the previous law.¹¹ The character of the act as a complete codification of the law, justifies, at times,

² For list of states in which the negotiable instruments laws have been adopted, see Appendix C.

³ *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 111 Am. St. Rep. 717, 2 L. R. A. (N. S.) 299.

⁴ *Gilpin v. Savage*, 60 Misc. 605, 112 N. Y. Supp. 802; *Union Stock Yards Nat. Bank v. Bolan*, 14 Idaho, 87, 93 Pac. 508, 125 Am. St. Rep. 146; *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879.

⁵ *Gilpin v. Savage*, 60 Misc. 605, 112 N. Y. Supp. 802.

⁶ The act was intended to provide a complete and comprehensive law on the subject. *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426; *First Nat. Bank v. Miller*, 139 Wis. 126, 120 N. W. 820.

^{7, 8} *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451; *Bank of England v. Vagliano Bros.* [1891] App. Cas. 107, 145.

⁹ *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

¹⁰ *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 124 Am. St. Rep. 275.

¹¹ *Bank of England v. Vagliano Bros.* [1891] App. Cas. 107, 145.

the application of the maxim "*Expressio unius est exclusio alterius.*"¹² In construing provisions of the American act copied from the English Bills of Exchange Act, it has been said that, where previous decisions in the two countries are at variance, "it would seem not unreasonable to suppose that it was the intention of the framers of the American act" to have it "construed according to the law of this country rather than of England."¹³

TITLE OF LAWS.

§ 2. The act only deals with "negotiable" instruments.

The general title of the act is "A general act relating to Negotiable Instruments (being an act to establish a law uniform with the laws of other states on that subject)." This title has been held sufficient under a constitutional provision providing that no law shall embrace more than one subject to be expressed in the title.¹⁴

The negotiable instruments laws, as passed in the various states, have almost uniformly adopted the short title "Negotiable Instruments Law."¹⁵

This title, when taken with the provisions that the words "bill" "note," and "instrument" shall mean, respectively, bill of exchange, negotiable promissory note, and negotiable instrument,¹⁶ excludes non-negotiable instruments.¹⁷ Such instruments are

¹² *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426.

¹³ *Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49.

¹⁴ *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424.

¹⁵ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., W. Va., Wyo. (§190); Ill. (§189); Kan. (§1); Md. (§13); Mich. (§1); N. Y. (§1); Okl. (art. 1); R. I. (§1); Wis. (§1675). Arizona, Massachusetts, Nebraska, Ohio and Washington are the exceptions.

^{16, 17} *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§191); Ariz. (§3487); Ill. (§190); Kan. (§2); Md. (§14); Mich. (§2); Neb. (§189); N. H. (§190); N. Y. (§2); Ohio (§3178); Okl. (art. 1); R. I. (§2); Wis. (§675). *Harvey v. Dimon*, 36

still governed by the rules of the common law, or by the statutes specially applicable to them.

It will thus be seen that, as soon as non-negotiability is established by applying the tests laid down in the sections prescribing the proper form of negotiable instruments, that fact will preclude the application of any of the other sections of the negotiable instruments laws to the instrument in question.¹⁸

APPLICATION OF LAWS.

§ 3. The negotiable instruments laws have no retroactive effect.

The negotiable instruments laws do not apply to instruments made and delivered prior to their passage,¹⁹ though this is not necessarily true as to indorsements made on such instruments after the enactment of the statute.^{19a} Had this provision been omitted, the courts doubtless would have construed the laws to be inapplicable to instruments delivered before their passage, under the general rule that a statute will not be given a retroactive effect.²⁰

To determine what constitutes a delivery prior to the passage of one of these laws, we must look to the definition of "delivery" given in such laws. It is there defined as a "transfer of possession, actual or constructive, from one person to another."²¹

Pa. Super. Ct. 82; *Westberg v. Chicago Lumber & Coal Co.*, 117 Wis. 589, 94 N. W. 572.

¹⁸ But see *Allison v. Hollembeak*, 138 Iowa, 479, 114 N. W. 1059.

¹⁹ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§195); Ariz. (—); Ill. (§194); Kan. (§6); Md. (§18); Mich. (§2); Neb. (§194); N. H. (§194); N. Y. (§6); Ohio (§3178); Okl. (art. 1); R. I. (§6); Wis. (§1675). *Barden v. Hornthal* (N. C.) 65 S. E. 513; *Dorsey v. Wellman* (Neb.) 122 N. W. 989.

^{19a} *Mackintosh v. Gibbs* (N. J. Law) 74 Atl. 708.

²⁰ *Parkinson v. Brandenburgh*, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326; *Fife v. Oshkosh*, 89 Wis. 540, 62 N. W. 541.

²¹ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§191); Ariz. (§3487); Ill. (§190); Kan. (§2); Md. (§14); Mich. (§2); Neb. (§189); N. Y. (§2); N. H. (§190); Ohio (§3178); Okl. (art. 1); R. I. (§2); Wis. (§1675).

Possession then by the payee, before the passage of one of these laws, would be *prima facie* evidence of delivery before that time.²² The effect of this provision has been considered by the courts in New York, where it has been held that the subsequent provision that notes payable to the order of the maker must be indorsed by him²³ does not apply to a note negotiated before the passage of the law,²⁴ and that questions of demand and notice relating to an instrument protested before the passage of the law are not governed thereby.²⁵ There is some conflict as to whether the law applies to a renewal note given after the taking effect of the act, the original note having been given before that time.²⁶ But by holding the act to apply to such notes, it is not thereby rendered unconstitutional as impairing the obligation of a contract.²⁷

When laws take effect.

The time for the negotiable instruments laws to take effect is, of course, different in the different states.²⁸ In some of the states the law takes effect from and after its passage, and in others it

²² *Mahon's Adm'r v. Sawyer*, 18 Ind. 73; *Newcombe v. Fox*, 1 App. Div. 389, 37 N. Y. Supp. 294; *Kidder v. Horrobin*, 72 N. Y. 159; *Woodford v. Dorwin*, 3 Vt. 82, 21 Am. Dec. 573; *Mitchell v. Conley*, 8 Eng. (Ark.) 414.

For a discussion of the question of delivery, see post, §§27-29.

²³ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Or., Okl., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§184) Ariz. (§3487); Ill. (§183); Kan. (§191); Md. (§203); Mich. (§186); Neb. (§183); N. Y. (§320); Ohio (§3177 v); R. I. (§192); Wis. (§1684).

²⁴ *Odell v. Clyde*, 23 Misc. 734, 53 N. Y. Supp. 61.

²⁵ *University Press v. Williams*, 28 Misc. 52, 59 N. Y. Supp. 817. See, also, *McMoran v. Lange*, 25 App. Div. 11, 48 N. Y. Supp. 1000.

²⁶ That it does. *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086; *Far Rockaway Bank v. Norton*, 186 N. Y. 485, 79 N. E. 709.

That it does not. *People's Nat. Bank v. Schepflin*, 73 N. J. Law, 29, 62 Atl. 333.

²⁷ Old debt extinguished by renewal note. *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086.

²⁸ See Appendix C.

takes effect on a specified day after, or on the expiration of a specified period after, passage.²⁹ Where the law takes effect at a date different from the date of its passage, the question whether instruments executed and delivered between the time of the passage of the law and the time it took effect are governed thereby is important. In a case where a certain provision of a statute was to take effect in "April next," the court said that a statute must be "understood as beginning to speak at the moment it became a law, and not before. It must have the same construction as if passed on the day when it took effect;"³⁰ and Cooley, J., in a case involving a statute which, under the constitution of Michigan, took effect ninety days from the end of the session at which it was passed, the legislature not having otherwise directed, said: "When the legislature, for reasons satisfactory to them, decide to postpone the period for the statute to come into operation, to a later period, it is to be presumed, nothing appearing to the contrary, that in the particular case it was deemed important that more time be allowed for citizens to ascertain the proposed changes, and to become acquainted with their bearings. The time thus allowed is the reasonable time fixed by the legislature to bring knowledge of the law home to the parties interested, before they are required to govern their actions by it." This case held that such a statute, between the time of its passage and the time it was to take effect, was not even notice to persons to be affected by it.³¹ Under these decisions, and the general rule that an instrument is governed by the law in force at the time it was executed, it is clear that negotiable instruments executed and delivered between the passage of one of the negotiable instru-

²⁹ See post, Appendix B.

³⁰ *Rice v. Ruddiman*, 10 Mich. 125. See, also, *Charless v. Lamberson*, 1 Iowa, 435, 63 Am. Dec. 457, where a statute for the protection of homesteads, which made them liable for all debts contracted prior to its passage, was held to mean "prior to its taking effect," although that period was some time after its enactment.

³¹ *Price v. Hopkin*, 13 Mich. 318. See, also, *People v. Johnston*, 6 Cal. 674; *Bond v. Dolby*, 17 Neb. 491, 23 N. W. 351.

ments laws and the time fixed for it to take effect are not governed thereby.³²

WHEN LAW MERCHANT GOVERNS.

§ 4. The law merchant governs in cases not provided for.

In cases not provided for in the negotiable instruments laws, the rules of the law merchant govern.³³ Obviously, any prior statute repealed by any one of the negotiable instruments laws is not included in the term "law merchant," as here used. The term, then, must be given its primal meaning, which is a code or system of rules arising out of the usages and customs of trade.

The exigencies of trade required something more elastic than a purely cash basis for business transactions. A credit basis which treated the evidence of indebtedness as an ordinary contract, and allowed a transferee no greater rights than his transferor,—in other words, saddled upon him all equities and defenses to which the contract was subject between the original parties,—would not tend to increase trade to any great extent; so a more extended credit system arose by custom among merchants, which allowed certain evidences of indebtedness to be transferred free from all prior equities, to persons who took in due course of business, without notice, and in good faith. Bills of exchange were always within the custom of merchants, and all dispute as to the status of promissory notes was settled by the statute (3 & 4 Anne, c. 9, § 1), which placed them on the same basis as bills of exchange.³⁴

³² *Duerson's Adm'r v. Alsop*, 27 Grat. (Va.) 229; *Barlow v. Gregory*, 31 Conn. 261; *Cook v. Mutual Ins. Co.*, 53 Ala. 37.

³³ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§196); Ariz. (§3491); Ill. (§195); Kan. (§7); Md. (§19); Mich. (§2); Neb. (§194); N. Y. (§7); N. H. (§195); Ohio (§3178 e); Okl. (art. 1); R. I. (§7); Wis. (§1675).

³⁴ This statute provided, *inter alia*, that "all notes in writing whereby any person shall promise to pay to any other person, his order, or unto bearer, any sum of money mentioned in the note, * * * shall be assignable or indorsable over in the same manner as inland bills of exchange are according to the custom of merchants; * * * and that any person to whom such note is indorsed or assigned, or the money therein

The rules of the law merchant and the decisions of the English courts affecting them, together with the English statutes affirming or modifying these rules and decisions, formed part of the system of law which the American colonies adopted after the Revolution, and are now generally considered as a part of the common law.³⁵

In cases governed by the laws of sister states, the court will not presume the negotiable instruments law in force in such state but will presume it to be the same as the common law of the forum previous to the enactment of the statute.³⁶

LAWS REPEALED.

§ 5. All prior inconsistent laws are repealed.

In some of the states the negotiable instruments law has expressly repealed a schedule of prior statutes relating to negotiable instruments, and in others it has repealed generally all inconsistent acts.³⁷ Where no express repeal is stated, prior inconsistent and repugnant acts are repealed by implication.³⁸ As

mentioned ordered to be paid by indorsement thereon, may maintain his action for such sum of money either against the person who assigned the note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange." It was repealed by the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61). The provisions of the statute of Anne are, however, reaffirmed in the Bills of Exchange Act, §89, of which provides that, with the exceptions therein noted, the provisions of such Bills of Exchange Act touching bills of exchange shall apply also to promissory notes.

³⁵ *Cook v. Renick*, 19 Ill. 598; *Platt v. Eads*, 1 Blackf. (Ind.) 80; *Board Com'rs Bartholomew Co. v. Bright*, 18 Ind. 93. The law merchant is presumed to be in force in the state until the contrary is shown. *Hudson v. Matthews*, 1 Morris (Iowa) 94.

³⁶ *Demelman v. Brazier*, 193 Mass. 588, 79 N. E. 842. Common law presumed to exist. *Bank of Laddonia v. Bright-Coy Commission Co.* (Mo. App.) 120 S. W. 648.

³⁷ See table of repealed acts in Appendix.

³⁸ *People v. Palmer*, 52 N. Y. 83; *Wood v. Oakley*, 11 Paige (N. Y.) 403; *Grant County v. Sels*, 5 Or. 243; *Greeley v. City of Jacksonville*, 17 Fla. 174; *Wirt v. Stubblefield*, 17 App. D. C. 283.

the negotiable instruments laws purport to revise and codify the rules and statutes relating to negotiable instruments, they repeal also all prior statutes on the subject, even though such statutes are not inconsistent with the provisions of the negotiable instruments laws.³⁹ The reason for this rule is that there is a reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments, embracing the same subject-matter, in force at the same time.⁴⁰ The question is one of legislative intent, and, if the new legislation was intended as a substitute for the old, the old is repealed by implication.⁴¹ This rule is of general application, though the provisions of the prior statutes have not been embodied in the codification.⁴²

³⁹ *Commonwealth v. Kelliher*, 95 Mass. (12 Allen) 480; *Cahall v. Citizens' Mut. Bldg. Ass'n*, 61 Ala. 232; *Bartlet v. King*, 12 Mass. 536, 7 Am. Dec. 99; *Wirt v. Stubblefield*, 17 App. D. C. 283; *Tilley v. Hanell*, 118 Tenn. 115, 101 S. W. 424.

⁴⁰ *Commonwealth v. Kelliher*, 94 Mass. (12 Allen) 480.

⁴¹ *State v. Harris*, 10 Iowa, 441; *County Com'rs of Prince George's Co. v. Commissioners of Laurel*, 51 Md. 457; *Barker v. Bell*, 46 Ala. 216.

⁴² *Rutland v. Mendon*, 18 Mass. (1 Pick.) 154; *Pingree v. Snell*, 42 Me. 53.

CHAPTER II.

DEFINITIONS AND SPECIAL PROVISIONS RELATING TO BILLS, NOTES AND CHECKS.

- § 6. Promissory Notes.
- § 7. Bills of Exchange.
- § 8. (a) Inland Bills.
(b) Foreign Bills.
(c) Bills Drawn in Sets.
- § 9. Checks.
- § 10. General Definitions.

PROMISSORY NOTES.

- § 6. **A negotiable promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.**

A "negotiable promissory note," as defined by the negotiable instruments laws, is "an unconditional promise made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money, to order or to bearer."¹ This definition embodies the elements of a negotiable instrument, as set forth in other sections.²

¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass.,

² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§132); Ariz. (§3435); Ill. (§131); Kan. (§139); Md. (§151); Mich. (§134); Neb. (§131); N. Y. (§200); Ohio (§3175-w); Okl. (119); R. I. (§140); Wis. (§1680-f). See, also, chapter IV.

When bill may be treated as promissory note, see post, §67.

BILLS OF EXCHANGE.

§ 7. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the addressee to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.

§ 8. A bill of exchange may be either

- (a) An inland bill, or
- (b) A foreign bill, and
- (c) May be drawn in sets.

The generally accepted form of a bill of exchange is embodied in the definition given in the negotiable instruments laws, viz. . "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer."³ This definition is amply sustained by

Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§184); Ariz. (§3487); Ill. (§183); Kan. (§191); Md. (§203); Mich. (§186); Neb. (§183); N. Y. (§320); Ohio (§3177 v); R. I. (§192); Wis. (§1684).

Edelman v. Rams, 58 Misc. 561, 109 N. Y. Supp. 816. Instrument within definition is negotiable though it contains the word "negotiable." Alexander & Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353. When bill may be treated as promissory note, see post, §67.

Judge Story's definition, "A promissory note is a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein," is quoted with approval in Cayuga County Nat. Bank v. Purdy, 56 Mich. 6, 22 N. W. 93, and Walker v. Thompson, 108 Mich. 686, 66 N. W. 584. See, also, cases cited in last mentioned case.

³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§126); Ariz. (§3429); Ill. (§125); Kan. (§

the authorities,⁴ and its different substantive elements, considered as essentials to negotiability, are discussed in a later chapter of this work.⁵ The terms "bill of exchange" and "draft" are interchangeable, but the latter term is used more generally to designate inland than foreign bills.⁶

Same—Several drawees.

A bill of exchange "may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession."⁷ This provision of the negotiable instruments laws seems to render a bill addressed to two or more drawees in the alternative or in succession not only non-negotiable but invalid. By another provision, instruments payable to the order of "one or some of several payees" are payable to order, and are negotiable.⁸ How the courts will

133); Md. (§145); Mich. (§128); Neb. (§125); N. Y. (§210); Ohio (§3175 q); R. I. (§134); Wis. (§1680).

Cashier's check is a bill of exchange payable on demand. *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522. Accepted sight draft, for the price of goods, with bill of lading attached, indorsed and negotiated by the payee, is governed by commercial law. *Bank of Guntersville v. Jones Cotton Co. (Ala.)* 46 So. 971.

The word "or" before "determinable" was omitted in the law as first adopted in New York, but the omission was supplied by amendment. Laws 1898, c. 336, §25.

⁴ *Kendall v. Galvin*, 15 Me. 131, 32 Am. Dec. 141; *Biesenthal v. Williams*, 62 Ky. (1 Duv.) 329, 85 Am. Dec. 629; *Luff v. Pope*, 5 Hill (N. Y.) 414; *Newman v. Frost*, 52 N. Y. 422; *Henderson v. Pope*, 39 Ga. 361; *Rice v. Ragland*, 29 Tenn. (10 Humph.) 545, 53 Am. Dec. 737.

⁵ See chapter IV.

⁶ *Cole v. Dalton*, 6 Daly (N. Y.) 484.

⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§128); Ariz. (§3431); Ill. (§127); Kan. (§135); Md. (§147); Mich. (§130); Neb. (§127); N. Y. (§212); Ohio (§3175 s); R. I. (§136); Wis. (§1680 b).

The words "or in succession" are not in the Wisconsin Negotiable Instruments Law.

⁸ See, also, post, §50, subd. 6, and notes.

harmonize these apparently inconsistent provisions remains to be seen.

Same—Inland and foreign bills.

An inland bill is one which is, or on its face purports to be, both drawn and payable within the same state, and any other is a foreign bill.⁹ Thus, a bill drawn by one resident of a state upon another resident of the same state is an inland bill,¹⁰ and so is one drawn in one city of a state and payable in another city of the same state.¹¹ But a bill drawn in one state by a resident thereof, on a resident of another state, or country, and payable in the latter state, is a foreign bill.¹²

It will thus be seen that, in determining whether a bill is inland or foreign, the various states of the Union are considered as foreign to each other.

Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§8); Ariz. (§3311); Ill. (§8); Kan. (§15); Md. (§27); Mich. (§10); Neb. (§8); N. Y. (§27); Ohio (§3171 a); R. I. (§16); Wis. (§1675-8).

⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§129); Ariz. (§3432); Ill. (§128); Kan. (§136); Md. (§ 148); Mich. (§ 131); Neb. (§ 128); N. Y. (§ 213); Ohio (§ 3175 t); R. I. (§137); Wis. (§1680-e).

Bank of Laddonia v. Bright-Coy Commission Co. (Mo. App.) 120 S. W. 648.

Damages allowable on protested foreign bill, see post, §211.

¹⁰ *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. (1 Gilm.) 15.

¹¹ *Young v. Bennett*, 70 Ky. (7 Bush) 474.

¹² *Kickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 28 Law. Ed. 866; *Buckner v. Finley*, 27 U. S. (2 Pet.) 586, 7 Law. Ed. 528; *Joseph v. Salomon*, 19 Fla. 623; *Ticonic Bank v. Stackpole*, 41 Me. 302; *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. 269; *Phoenix Bank v. Hussey*, 29 Mass. (12 Pick.) 483; *Ocean Nat. Bank v. Williams*, 102 Mass. 141; *Aborn v. Bosworth*, 1 R. I. 401; *Gardner v. Bank of Tennessee*, 31 Tenn. (1 Swan) 420; *Brown v. Ferguson*, 4 Leigh (Va.) 37, 39, 24 Am. Dec. 707; *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 121 Am. St. Rep. 858.

Same—Bills in sets.

It is customary to draw a foreign bill of exchange in a set of two or three, usually three. One of the set recites that it is the "first of exchange," and orders payment to be made if the "second and third (are) unpaid," another that it is the "second of exchange, first and third unpaid," and the third that it is the "third of exchange, first and second unpaid."¹³ If each part is thus numbered, and refers to the other parts, all the parts constitute one bill.¹⁴

CHECKS.**§ 9. A check is a bill of exchange drawn on a bank and payable on demand.**

The main distinguishing features of a check are that it is drawn on a bank and is payable on demand.¹⁵ A check payable

¹³ Where eight blank acceptances, four of which were designated "First of exchange (second unpaid)," and four "second of exchange (first unpaid)," were sent to a correspondent, who filled the blanks, and negotiated them as separate bills, a purchaser of one of the bills was not charged with notice that it was one of a set by the presence of the words "Second of exchange, first unpaid," and the acceptor was liable. *Bank of Pittsburg v. Neal*, 63 U. S. (22 How.) 96, 16 Law. Ed. 323.

Payment of bills drawn in sets, see post, §252.

¹⁴ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§178); Ariz. (§3481); Ill. (§177); Kan. (§185); Md. (§197); Mich. (§180); Neb. (§177); N. Y. (310); Ohio (§3177 o); R. I. (§186); Wis. (§1631-35).

Durkin v. Cranston, 7 Johns. (N. Y.) 442; *Miller v. Hackley*, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372.

Making a check in duplicate, see post, § 9.

¹⁵ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 185); Ariz. (§ 3487); Ill. (§ 184); Kan. (§ 192); Md. (§ 204); Mich. (§ 181); Neb. (§ 184); N. Y. (§ 321); Ohio (§ 3177V); Okl. (§ 185); R. I. (§ 193); Wis. (§ 1684-1).

Cossel v. Regierer, 114 N. Y. Supp. 601; *Blake v. Hamilton Dime Sav. Bank Co.*, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290.

at a designated future time, or at a certain period after date, is a bill of exchange. The decisions on this point generally involve the question of right to days of grace. Though such days have been abolished by most of the negotiable instruments laws,¹⁶ it is clear that an instrument payable otherwise than on demand is not properly a "check," within the meaning of the definition of such instrument in these laws.¹⁷ Checks are defined by them as bills of exchange drawn on a bank and payable on demand, and the provisions relating to such bills are, with certain exceptions, made applicable to checks.¹⁸ A check may be made in duplicate,

Bill drawn on business house is not a check. *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 121 Am. St. Rep. 858.

Checks are negotiable instruments. *Boswell v. Citizens' Sav. Bank*, 123 Ky. 485, 29 Ky. Law Rep. 988, 96 S. W. 797; *Morrison v. Bailey*, 5 Ohio St. 13, 64 Am. Dec. 632.

It is essential to a check that it be payable on demand. *Harrison v. Nicollet Nat. Bank*, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746.

¹⁶ *Georgia Nat. Bank v. Henderson*, 46 Ga. 487, 12 Am. Rep. 590; *Merchants' Bank v. Woodruff*, 6 Hill (N. Y.) 174; *Hawley v. Jette*, 10 Or. 31, 45 Am. Rep. 129; *Brown v. Lusk*, 12 Tenn. (4 Yerg.) 210; *Harrison v. Nicollet Nat. Bank*, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746. Contra, see *Way v. Towle*, 155 Mass. 374, 29 N. E. 506; *Andrew v. Blachly*, 11 Ohio St. 89; *Westminster Bank v. Wheaton*, 4 R. I. 30.

¹⁷ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§85); Ariz. (§3388); Neb., Ill. (§85); Kan. (§92); Md. (§104); Mich. (§87); Neb. (§85); N. Y. (§145); Ohio (§3174c); R. I. (§93); Wis. (§§1678-15).

¹⁸ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§185); Ariz. (§3487); Ill. (§184); Kan. (§192); Md. (§204); Mich. (§187); Neb. (§184); N. Y. (§321); Ohio (§3177-v); R. I. (§193); Wis. (§1684-1).

Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. App. 182, 73 Pac. 873; *Cassel v. Regierer*, 114 N. Y. Supp. 601. This is declaratory of the law in some of the states. *Laird v. State*, 61 Md. 309; *Henshaw v. Root*, 60 Ind. 220; *Planters' Bank v. Merritt*, 54 Tenn. (7 Heisk.) 177; *Pursell v. Allemon*, 22 Grat. (Va.) 739.

See, also, *Rogers v. Durant*, 140 U. S. 298, 35 Law. Ed. 482.

like a foreign bill of exchange,¹⁹ but is not a foreign bill, though drawn by a bank in one state on a bank in another state.²⁰

§ 10. General definitions.

The negotiable instruments laws provide that in construing the various provisions of the act the following words shall be deemed to have the defined meaning, unless the context of the act otherwise requires.²¹

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counterclaim and set-off.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

¹⁹ Merchants' Nat. Bank v. Ritzniger, 118 Ill. 484, 8 N. E. 834.

²⁰ Merchants' Nat. Bank v. Ritzniger, 118 Ill. 484, 8 N. E. 834.

²¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§191); Ariz., (§3487); Ill. (§190); Kan. (§2); Md. (§14); Mich. (§2); Neb. (§189); N. H. (§190); N. Y. (§2); Ohio (§3178); Okl. (art. 1); R. I. (§2); Wis. (§1675).

CHAPTER III.

EXECUTION AND DELIVERY.

- § 11. Freedom of Consent.
- § 12. Necessity of Writing.
- § 13. Place and Time of Execution.
- § 14. Presumption of Date.
- § 15. Insertion of Date.
- § 16. Date Given Presumed Correct.
- § 17. Exception.—Bona Fide Holders.
- § 18. Antedating and Postdating.
- § 19. Incomplete Instruments.
- § 20. Completion Must be as Authorized.
Exception.—Bona Fide Holders.
- § 21. Signature—Necessity and Position.
- § 22. Form.
- § 23. Signature by Agent.
- § 24. Liability of Agent.
- § 25. Descriptive Words.
- § 26. Signature by "Procurator."
- § 27. Delivery—Necessity.
- § 28. Sufficiency of Delivery.
Conditional Delivery.
- § 29. Presumptions.

FREEDOM OF CONSENT.

- § 11. **Like other contracts, the execution of a negotiable instrument must be unattended by fraud, duress, incapacity, or other vitiating elements.**

Every negotiable instrument is a contract and as such its ex-

ecution must be unattended by fraud,¹ duress,² or incapacity on the part of the maker, drawer, indorser, or other person assuming liabilities on the instrument.³ The general rules of contracts govern this phase of a negotiable instrument.⁴

NECESSITY OF WRITING.

§ 12. The instrument must be in writing.

A negotiable instrument must, of course, be in writing.⁵ While it is not safe to write a bill or note in pencil because of the danger of erasures and alterations, one written in pencil is valid and negotiable,⁶ at least so long as it is legible.⁷ It is not necessary, however, that the instrument be written out in either ink or pencil, for printed forms of bills and notes have come into such common use that the negotiable instruments laws have recognized the custom by providing that "writing" shall include print.⁸

¹ One who signs a note cannot set up a defense that he did not read the fine print on its face. *Bank of Morgan City v. Herwig*, 121 La. 513, 46 So. 611.

² *Rueping Leather Co. v. Watke*, 135 Wis. 616, 116 N. W. 174.

³ *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348.

⁴ There being no necessity for it, the negotiable instruments act makes no general provision as to fraud, etc. General works should be consulted.

⁵ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§1); *Ariz.* (§3304); *Ill.* (§1); *Kan.* (§ 8); *Md.* (§ 20); *Mich.* (§ 3); *Neb.* (§ 1); *N. Y.* (§ 20); *Ohio* (§ 3171); *R. I.* (§ 9); *Wis.* (§ 1675-1).

⁶ *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127. An indorsement may be written in pencil. *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755; *Closson v. Stearns*, 4 Vt. 11, 23 Am. Dec. 245.

⁷ *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127.

⁸ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§191); *Ariz.* (§3487); *Ill.* (§190); *Kan.* (§2);

PLACE AND TIME OF EXECUTION.

§ 13. A negotiable instrument need not specify the place where it is drawn nor its date.

In accordance with the common law the negotiable instruments act provides that the validity and negotiable character of an instrument are not affected by its failure to specify the place where it is drawn.⁹ Neither at common law,¹⁰ nor under the negotiable instruments law,¹¹ is dating the bill or note essential to its validity. This refers merely to the form of the instrument and not to the materiality of the true date.¹²

§ 14. Not being dated, the instrument will be considered dated as of the time it was issued.

If the instrument is not dated, it will be considered to be

Md. (§14); Mich. (§2); Neb. (§189); N. H. (§190); N. Y. (§2); Ohio (§3178); Okl. (art. 1); R. I. (§2); Wis. (§1675).

See, also, *Farmers' Bank of Kentucky v. Ewing*, 78 Ky. 264, 39 Am. Rep. 231; *Zimmerman v. Rote*, 75 Pa. 188.

⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§6); Ariz. (§3309); Ill. (§6); Kan. (§13); Md. (§25); Mich. (§8); Neb. (§6); N. Y. (§25); Ohio (§3171e); R. I. (§14); Wis. (§1675-6).

¹⁰ *Michigan Ins. Co. v. Estate of Leavenworth*, 30 Vt. II; *Sparran v. Neeley*, 91 Pa. 17; *Archer v. Clafin*, 31 Ill. 306; *Husbrook v. Wilder*, 1 Pin. (Wis.) 645. A defective date, consisting merely of the figures "1887," does not invalidate an order. *Weld v. Eliot Five Cent Sav. Bank*, 158 Mass. 339, 33 N. E. 519.

¹¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§6); Ariz. (§3309); Ill. (§6); Kan. (§13); Md. (§25); Mich. (§8); Neb. (§6); N. Y. (§25); Ohio (§3171e); R. I. (§14); Wis. (§1675-6).

Error to dismiss complaint on note for failure to give date of latter; motion to make pleading more definite might lie. *Church v. Stevens*, 56 Misc. 572, 107 N. Y. Supp. 310.

¹² See post, insertion of date, § 17; alteration of instruments, § 246.

dated as of the time when it was issued,¹³ that is, as of the time when it is first delivered, complete in form, to a person who takes it as a holder.¹⁴

INSERTION OF DATE.

§ 15. Being undated and payable at a fixed period after date, any holder may insert the true date and the instrument is payable accordingly.

Any holder of an instrument payable at a fixed period after date, but not dated, may insert therein the true date of its issuance.¹⁵ This section should be construed in connection with the provision providing that an incomplete instrument must be filled up strictly in accordance with the authority given in order that

¹³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§17); Ariz. (§3320); Ill. (§17); Kan. (§24); Md. (§36); Mich. (§19); Neb. (§17); N. Y. (§36); Ohio (§3171P); R. I. (§25); Wis. (§1675-17).

¹⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. J., N. M., N. C., N. D., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§191); Ariz. (§3487); Ill. (§190); Kan. (§2); Md. (§14); Mich. (§2); Neb. (§189); N. H. (§190); N. Y. (§2); Ohio (§3178); Okl. (art. 1); R. I. (§2); Wis. (§1765).

¹⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§13); Ariz. (§3316); Ill. (§13); Kan. (§20); Md. (§32); Mich. (§15); Neb. (§13); N. Y. (§32); Ohio (§3171L); R. I. (§21); Wis. (§1675-13).

The payee of a note delivered with the place for the date left blank has no implied authority to antedate the instrument. *Goodman v. Simonds*, 19 Mo. 106; *Emmons v. Meeker*, 55 Ind. 321. Where the month is given, the holder may fill the blank for the day of the month with any date within the month. *Page v. Morrell*, 3 Keyes (N. Y.) 117, 3 App. Dec. 433. For authority to insert date on accommodation paper, see *Androscoggin Bank v. Kimball*, 64 Mass. (10 Cush.) 373; *Mitchell v. Culver*, 7 Cow. (N. Y.) 336. Authority to fill blanks, see post, §§19, 20. Inserting date of acceptance, see post, chapter VIII, §§§ 99, 100.

it may be enforced against any person who became a party to it prior to its completion,¹⁶ and, as so construed, apparently does not abrogate the common-law rule that an insertion of the wrong date is a material alteration avoiding the instrument as between the parties.¹⁷

PRESUMPTIONS.

§ 16. **The instrument being dated, the date given is prima facie the true date.**

§ 17. **Exception.—The presumption is conclusive as against a subsequent holder in due course.**

Where the instrument is dated, the date given is prima facie the true date of the making or drawing of the instrument,¹⁸ and the burden of proof to show a mistake in the date of a note in suit is on the defendant.¹⁹ As stated, this presumption is not conclusive,

¹⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§14); Ariz. (§3317); Ill. (§14); Kan. (§21); Md. (§33); Mich. (§16); Neb. (§14); N. Y. (§33); Ohio (§3171m); R. I. (§22); Wis. (§1675-14).

¹⁷If a date prior to the delivery of the instrument is inserted in a note payable two years for date, it avoids the note. *English v. Beneman*, 5 Pike (Ark.) 377. See, also, post, chapter XV, § 246, holding change of date a material alteration.

¹⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§11); Ariz. (§3314); Ill. (§11); Kan. (§18); Md. (§30); Mich. (§13); Neb. (§11); N. Y. (§30); Ohio (§3171j); R. I. (§19); Wis. (§1675-11).

See, also, *Bayley v. Taber*, 6 Mass. 451; *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70; *Kinsely v. Sampson*, 100 Ill. 573.

¹⁹*Towles v. Williams*, 2 Rich. Law (S.C.) 562. Thus, where a statute made certain notes void if issued after a certain day, notes dated before that day are presumed to have been issued before that time, and the burden is on the defendant to show otherwise. *Bayley v. Taber*, 6 Mass. 451.

and may be rebutted by parol or extrinsic evidence showing that the date given is not the true date,²⁰ on the theory that the date is only descriptive,²¹ but the mistake, to be available, should be pleaded.²²

Exception; bona fide holders.

Ordinarily, the true date must be inserted,²³ but the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but as to him the date so inserted will be regarded as the true date.²⁴ By rendering this presumption conclusive without qualification, or, in other words, by conclusively presuming prejudice in the case of a bona fide holder, the negotiable instruments act has apparently changed and strengthened the common-law rule allowing the mistake to be corrected, except as to an innocent indorsee or purchaser who would be prejudiced by the correction.²⁵

²⁰ *Bank of Cumberland v. Mayberry*, 43 Me. 198. Parol evidence is admissible to show a mistake in date as between the original parties. *Biggs v. Piper*, 86 Tenn. 589, 8 S. W. 851; *Drake v. Rogers*, 32 Me. 524; *Barlow v. Buckingham*, 68 Iowa, 169, 26 N. W. 58. See, also, *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70. Parol evidence is admissible also when the date is ambiguous or illegible. *Fenderson v. Owen*, 54 Me. 372, 92 Am. Dec. 551. In an action by a bank on a note in the handwriting of the bank's cashier, it may be shown that he was not in the employ of the bank until after the date of the note. *Hauerwas v. Goodloe*, 101 Ala. 162, 13 So. 567. A note dated "1888" may be shown to have been executed in 1882. *Barlow v. Buckingham*, 68 Iowa, 169, 26 N. W. 58.

²¹ *Dean v. DeLezardi*, 2 Cushm. (Miss.) 424.

²² *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197.

²³ *Miles v. Major*, 25 Ky. (2 J. J. Marsh) 153.

²⁴ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., N. H., N. J., N. M., N. C., N. D. Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§13); Ariz. (§3316); Ill. (§13); Kan. (§20); Md. (§32); Mich. (§15); Neb. (§13); N. Y. (§32); Ohio (§3171L); R. I. (§21); Wis. (§1675-13).

²⁵ *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197.

ANTEDATING AND POSTDATING.

§ 18. Antedating or postdating an instrument does not affect its validity unless done for an illegal or fraudulent purpose.

The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not for an illegal or fraudulent purpose.²⁶ An antedated or postdated instrument may, of course, be negotiated after or before the date given,²⁷ and any one to whom such an instrument is delivered acquires title thereto as of the date of delivery.²⁸ One prejudiced by the antedating or postdating may show the actual time of delivery, and the instrument will be given effect from that time.²⁹ An instrument antedated to evade the law is invalid³⁰ as to all persons having notice.³¹

INCOMPLETE INSTRUMENTS.

§ 19. A person in possession, after delivery, of an incomplete instrument, has prima facie authority to complete it:

- (a) By filling up blanks therein if it is wanting in any material particular;
- (b) By filling up a paper signed in blank with the intent that it should be converted into a negotiable instrument.

²⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§12); Ariz. (§3315); Ill. (§12); Kan. (§19); Md. (§31); Mich. (§14); Neb. (§12); N. Y. (§31); Ohio (§3171K); R. I. (§20); Wis. (§1675-12).

Brewster v. McCardel, 8 Wend. (N. Y.) 478; Gray v. Wood, 2 Har. & J. (Md.) 328; Ohio Life Ins. & Trust Co. v. Winn, 4 Md. Ch. 253; Richter v. Selin, 8 Serg. & R. (Pa.) 425.

²⁷ Brewster v. McCardle, 8 Wend. (N. Y.) 478; Pasmore v. North, 13 East, 517.

²⁸ Same sections of negotiable instruments laws as last above cited.

²⁹ Baldwin v. Freyendall, 10 Ill. App. (10 Bradw.) 106.

³⁰ Williams' Ex'rs v. Williams, 15 N. J. Law, 255, where an attempt was made to evade the usury laws; Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57, where a note was antedated to avoid a statute prohibiting the issuance of such notes after a certain date.

³¹ Serle v. Norton, 9 Mees & W. 309.

The implied authority to complete an incomplete instrument is conditional upon there having been a previous, valid delivery of the instrument; for where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.³²

Filling blanks.

Prima facie authority is conferred on the person in possession of a negotiable instrument, to fill up the blanks therein if the instrument is wanting in any material particular.³³

While the authority is not limited to the filling of such blanks as are necessary to complete the instrument,³⁴ still the authority must be exercised according to the intended purpose and use of the instrument,³⁵ and depends upon the real authority which the signer in fact gave in the matter,³⁶ and it follows that the prima facie authority by the act may be met and overcome by evidence of what authority was in fact given.³⁷ In applying these rules it

³² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§15); Ariz. (§3318); Ill. (§15); Kan. (§22); Md. (§34); Mich. (§17); Ariz. (§15); N. Y. (§34); Ohio (§3171n); R. I. (§23); Wis. (§1675-15).

Massachusetts National Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

³³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§14); Ariz. (§3317); Ill. (§14); Kan. (§21); Md. (§33); Mich. (§16); Ariz. (§14); N. Y. (§33); Ohio (§3171m); R. I. (§22); Wis. (§1675-14).

Authority is merely prima facie. Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

³⁴ Johnston v. Hoover, 139 Iowa, 143, 117 N. W. 277.

"Material" is not synonymous with "necessary" so as to restrict the right to fill in an omission essential to the completion of the instrument, but includes all omitted matter usually found in such instruments. Id.

³⁵ First Nat. Bank of Wilkes-Barre v. Barnum, 160 Fed. 245. Does not authorize erasure of written or printed part and insertion of something else, though when signed instrument is a mere skeleton of a note. Id.

³⁶ Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

³⁷ Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

has been held that the holder of a negotiable instrument may insert his own name in a blank space left for the name of the payee,³⁸ and may fill a blank left for the time,³⁹ or the place⁴⁰ of payment, or for the amount payable.⁴¹

Paper signed in blank.

Where a blank paper is signed and delivered by the signer with intent that it shall be converted into a negotiable instrument, a holder has *prima facie* authority to fill it up as such for any amount.⁴²

³⁸ *Boyd v. McCann*, 10 Md. 118; *Thompson v. Rathbun*, 18 Or. 202, 22 Pac. 837. So of a note entirely blank. See *Mitchell v. Culver*, 7 Cow. (N. Y.) 336. At common law, where the maker of a check did not designate a payee, unless it was issued by him, no one else had authority to complete the instrument by writing in the name of a payee. *Reed v. Mattapan Deposit & Trust Co.*, 198 Mass. 306, 84 N. E. 469.

³⁹ *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Johns v. Harrison*, 20 Ind. 317.

⁴⁰ *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Winter v. Pool*, 104 Ala. 580, 16 So. 543.

⁴¹As to authority to add interest clause or fill up blanks left for interest clause, see *Hoopes v. Collingwood*, 10 Colo. 107, 13 Pac. 909, 3 Am. St. Rep. 565; *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. 657; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Farmers' Nat. Bank v. Thomas*, 79 Hun, 595, 29 N. Y. Supp. 837; *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274.

⁴²*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§14); Ariz. (§3317); Ill. (§14); Kan. (§21); Md. (§33); Mich. (§16); Ariz. (§14); N. Y. (§33); Ohio (§3171m); R. I. (§22); Wis. (§1675-14).

In the Wisconsin negotiable instruments law the words "*prima facie*" are left out, and the statute reads: "A signature on a blank paper delivered by the person making the signature, in order that the paper may be converted into a negotiable instrument, operates 'as an authority' to fill it up as such for any amount." In the negotiable instruments law as first adopted in New York, the words "*prima facie*" were printed in italics, but this was changed by amendments, doubtless on the theory that, by the use of italics, such words were unduly emphasized. *Laws 1898, c. 336, § 4*. A check properly signed and complete on its face is presumed to have been complete when delivered. *Hensel v. Chicago, St. P., M. & O. R. Co.*, 57 Minn. 88, 47 Am. St. Rep. 576.

§ 20. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time.

Exception.—As to a holder in due course to whom it is negotiated after completion.

Authority to fill in blanks may be either express or such as the law implies from the possession of an incomplete instrument. In either case the exercise of the authority must be in strict accordance with the authority given⁴³ and must be exercised within a reasonable time⁴⁴ in order to render it enforceable against one who became a party to the paper before its completion. In determining what is a “reasonable time” or an “unreasonable time” regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to the instrument, and the facts of the particular case.⁴⁵ Implied authority to fill in blanks goes no further than authorizing the insertion of that which is necessary to make the obligation speak according to its intended

⁴³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§14); Ariz. (§3317); Ill. (§14); Kan. (§21); Md. (§33); Mich. (§16); Neb. (§14); N. Y. (§33); Ohio (§3171m); R. I. (§22); Wis. (§1675-14).

Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426. Authority to fill a blank left for the amount in a draft which is limited to a fixed sum does not authorize the insertion of a larger amount on payment of an additional consideration. *Clower v. Wynn*, 59 Ga. 246.

⁴⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§14); Ariz. (§3317); Ill. (§14); Kan. (§21); Md. (§33); Mich. (§16); Neb. (§14); N. Y. (§33); Ohio (§3171m); R. I. (§22); Wis. (§1675-14).

⁴⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§193); Ariz. (§3489); Ill. (§192); Kan. (§4); Md. (§16); Mich. (§2); Neb. (§191); N. Y. (§4); Ohio (§3178b); R. I. (§4); Wis. (§1675).

purpose and use,⁴⁶ and in no case does it authorize a material alteration in the original terms of the paper.⁴⁷ The authority should be construed in the light of the purpose of the instrument⁴⁸ and with reference to other parts of it.⁴⁹

Holders in due course.

If, however, after completion, such instrument is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.⁵⁰

⁴⁶ First Nat. Bank of Wilkes-Barre v. Barnum, 160 Fed. 245.

⁴⁷ First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445; First Nat. Bank of Wilkes-Barre v. Barnum, 160 Fed. 245. Does not authorize erasure of written or printed part and insertion of something else, though when signed instrument is a mere skeleton of a note. First Nat. Bank of Wilkes-Barre v. Barnum, 160 Fed. 245. Where one indorsed printed form of note in which the date, amount, and time of payment were all blank, held the maker was not authorized to change place of payment as printed on form. *Id.*

⁴⁸ Authority given by a surety, on signing a note, and delivering it to the principal, to fill up a blank left for the amount with the amount of the debt, empowers the creditor to fill the blank with the true amount of the debt, regardless of the representations of the principal to the surety as to the amount. Eichelberger v. Old Nat. Bank, 103 Ind. 401, 3 N. E. 127.

⁴⁹ If there is an indication on the instrument of the amount for which it is to be made payable, as where the intended amount is expressed in figures on the margin, such figures limit the amount to be inserted in the blank in the body of the instrument. Hall v. Bank of the Commonwealth, 33 Ky. (3 Dana) 258.

⁵⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 14); Ariz. (§ 3317); Ill. (§ 14); Kan. (§ 21); Md. (§ 33); Mich. (§ 16); Neb. (§ 14); N. Y. (§ 33); Ohio (§ 3171m); R. I. (§ 22); Wis. (§ 1675-14).

Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

See post, chapter XI, § 170.

SIGNATURE — NECESSITY AND POSITION.

§ 21. An instrument to be negotiable must be signed by the maker or drawer, but the position of the signature is immaterial if it is clear that it was placed on the paper in the capacity of maker or drawer.

A negotiable instrument must be signed by the maker or drawer.⁵¹ As the act, however, merely requires that the instrument be "signed," the position of the signature is immaterial, it being sufficient if it appears in any part of the instrument.⁵² However, as a corollary to the provision that where the signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is now deemed an indorser,⁵³ the position of the signature must be such as to clearly indicate that it was placed upon the paper in the capacity of maker or drawer.⁵⁴ "This provision, by its very terms, applies only to a case of doubt arising out of the location of the signature upon the instrument. Names are sometimes placed at the side, on the end, or across the face of the instrument, and thus a doubt arises as to whether the signer intended to be bound as a maker or an indorser, or perhaps as a guarantor, and to solve these doubts the section in question was evidently framed. It was to

⁵¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

See, also, *May v. Miller*, 27 Ala. 515.

⁵² *Lincoln v. Hinzey*, 51 Ill. 435.

⁵³ See post, chapter XII, § 154.

⁵⁴ *Taylor v. Dobbins*, 1 Strange, 399; *Quin v. Sterne*, 26 Ga. 223, 71 Am. Dec. 204; *Lincoln v. Hinzey*, 51 Ill. 435; *Lampkin v. State*, 105 Ala. 1, 16 So. 575. Applying this rule, an accommodation party signing note on its face before delivery has been held a comaker, though word "surety" was prefixed to his name. *Edmonston v. Ascough*, 43 Colo. 55, 95 Pac. 313.

settle a doubt fairly arising from the ambiguous location of the name, and applies to no other,"⁵⁵ and hence does not apply where the doubt is as to whether the party intended to sign in an individual or in a representative capacity as maker,⁵⁶ and this holds true though the paper is in the hands of a bona fide holder.⁵⁷ The ambiguity being as to whether one, signing as a maker, intended to do so in a representative or individual capacity, the doubt may be removed by parol and extrinsic evidence.⁵⁸

SAME—FORM.

§ 22. No particular form is necessary and one signing in a trade or assumed name will be liable to the same extent as if he signed his own name.

It is much the safer practice for the maker or drawer to sign his name in full, but a signature by means of initials,⁵⁹ or by an abbreviation of the name of the maker,⁶⁰ by the use of figures,⁶¹ or by a mark, is sufficient, if intended as a signature.⁶² One sign-

⁵⁵ *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

⁵⁶ Where a note read: "Four months after date the N. W. S. W. promise to pay," and was signed "The N. W. S. W., E. R. S. Treas. J. W. M.," held J. W. M.'s liability was that of maker, the doubt being as to whether he acted as a representative or as an individual, and hence the statute did not apply. *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

⁵⁷ *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

⁵⁸ *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

⁵⁹ *Palmer v. Stephens*, 1 Denio (N. Y.) 471.

⁶⁰ See *Kemp v. McCormick*, 1 Mont. 420.

⁶¹ *Brown v. Butcher's & Drovers' Bank*, 6 Hill (N. Y.) 433, 41 Am. Dec. 755.

⁶² *Gervais v. Baird*, 2 Brev. (S. C.) 37; *Willoughby v. Moulton*, 47 N. H. 205; *Shank v. Butsch*, 28 Ind. 19; *Handyside v. Cameron*, 21 Ill. 588, 74 Am. Dec. 119; *Hilborn v. Alford*, 22 Cal. 482; *McGowan v. Collins* (Ala.) 46 So. 228; *Jackson v. Tribble* (Ala.) 47 So. 319.

ing in a trade or assumed name is liable to the same extent as if he had signed in his own name.⁶³

SIGNATURE BY AGENT.

§ 23. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. But to be liable on the instrument the principal should be disclosed.

The signature of any party to a negotiable instrument may be made by a duly authorized agent.⁶⁴ To be binding upon the principal the execution of the instrument must be within the apparent scope of the agent's authority.⁶⁵ No particular form of appointment is necessary, and the authority of the agent may be established as in other cases of agency.⁶⁶

⁶³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 18); Ariz. (§ 3321); Ill. (§ 18); Kan. (§ 25); Md. (§ 37); Mich. (§ 20); Neb. (§ 18); N. Y. (§ 37); Ohio (§ 3171q); R. I. (§ 26); Wis. (§ 1675-18).

Jewett v. Whalen, 11 Wis. 124, 129.

⁶⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§19); Ariz. (§3322); Ill. (§ 19); Kan. (§ 26); Md. (§ 38); Mich. (§ 21); Neb. (§ 19); N. Y. (§ 38); Ohio (§ 3171 R); R. I. (§ 27); Wis. (§ 1675-19).

⁶⁵ One taking a note, signed in partnership name, knowing it to have been signed by one of the partners outside the scope of his agency and the partnership business, cannot recover against the partnership or non-signing partners. King v. Mecklenburg, 43 Colo. 316, 95 Pac. 951.

⁶⁶ Same sections negotiable instruments laws last above cited. See Conroe v. Case, 74 Wis. 85, 41 N. W. 1064. As to ratification of unauthorized signature, see Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; Howard v. Duncan, 3 Lans. (N. Y.) 174; Paul v. Berry, 78 Ill. 158; First Nat. Bank v. Badger Lumber Co., 54 Mo. App. 327; Bell v. Waudby, 4 Wash. 743; Ballston Spa Bank v. Marine Bank, 16 Wis. 120.

Undisclosed principal.

In accordance with the rule that persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them and that a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent,⁶⁷ the negotiable instruments act has provided that no person is liable on an instrument whose signature does not appear thereon.⁶⁸

LIABILITY OF AGENT.

§ 24. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized.

Where the instrument shows either in the body thereof, or by means of words added after the signature, that it was signed for or on behalf of a principal, or in a representative capacity, the signer is not personally liable if he was duly authorized.⁶⁹ The undoubted effect of this section is to render one signing for or on behalf of a principal, or in a representative capacity, personally liable on the instrument if he acts without authority,⁷⁰ and

⁶⁷ *Briggs v. Partridge*, 64 N. Y. 363, 21 Am. Rep. 617.

⁶⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 18); Ariz. (§ 3321); Ill. (§ 18); Kan. (§ 25); Md. (§ 37); Mich. (§ 20); Neb. (§ 18); N. Y. (§ 37); Ohio (§ 3171q); R. I. (§ 26); Wis. (§ 1675-18).

Brown v. Parker, 89 Mass. (7 Allen) 337; *Bolles v. Walton*, 2 E. D. Smith (N. Y.) 164; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558. Firm on whom a draft is drawn by one of its commercial travelers is not liable thereon until acceptance. *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064.

⁶⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 20); Ariz. (§ 3323); Ill. (§ 20); Kan. (§ 27); Md. (§ 39); Mich. (§ 22); Neb. (§ 20); N. Y. (§ 39); Ohio (§ 3171 s); R. I. (§ 28); Wis. (§ 1675-20).

⁷⁰ *Frankland v. Johnson*, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234. Where the instrument recites a promise by the principal to pay, and is

thus changes the law as it generally existed in this country prior to the enactment of the statute.⁷¹ Under the law as it previously existed, the only cause of action against one acting as an agent without authority was for damages upon an implied warranty of authority, and this cause of action, not being upon the instrument, did not pass with the transfer of the latter unless specifically assigned. This provision of the statute would seem to render any such assignment unnecessary and to allow any holder of the instrument to sue the agent upon it.

§ 25. But the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

The mere addition of words describing the signer as an agent, or as acting in a representative capacity, without disclosing his principal, will not relieve the signer from personal liability⁷² as

signed by one as agent, proof that the ostensible agent had no authority to sign will render him personally liable. *Id.* Where the note recited that the "Western Seaman's Friend Society agrees to pay," and was signed "B. Frankland, Gen. Supt.," the signer was held to a personal liability, it appearing that he had no authority to bind the society, and that it was the intention of the parties that he be personally liable. In the original draft submitted to the conference of commissioners on uniformity of laws, the portion of the section under consideration reads as follows: "Where a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument." This is the rule under the English act and under the decisions of some states prior to the adoption of the Negotiable Instruments Act. *Miller v. Reynolds*, 92 Hun, 400, 36 N. Y. Supp. 660. The addition of the phrase "if he was duly authorized" would seem to leave the construction placed on the section in the text the only possible one.

⁷¹ *Miller v. Reynolds*, 92 Hun, 400, 36 N. Y. Supp. 660.

⁷² *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 20); *Ariz.* (§ 3323); *Ill.* (§ 20); *Kan.* (§ 27); *Md.* (§ 39); *Mich.* (§ 22); *Neb.* (§ 20); *N. Y.* (§ 39); *Ohio* (§ 3171 s); *R. I.* (§ 28); *Wis.* (§ 1675-20).

to innocent purchasers for value.⁷³ But the statute is not to be taken as changing the common law rule permitting the consideration and the conditions under which the instrument was delivered to be shown as between the original parties and those having notice of the facts relied upon as constituting a defense,⁷⁴ and hence, as between the original parties, it is not necessary that the signer's representative capacity appear upon the face of the note.⁷⁵ It follows that the effect of this section is limited to putting the payee of the note in possession of the knowledge that in its execution and delivery no personal liability was intended to be assumed by the makers,⁷⁶ and where the payee knows the maker is acting as an agent or trustee, the maker is not required to relieve himself of personal liability, to repeat to him in writing or orally information he already possesses.⁷⁷ In accordance with the rule stated, the word "agent," or a similar word, not disclosing the nature of the agency, or the name of the principal, added after the signature, is merely *descriptio personae*, and the signer is personally liable.⁷⁸ But if the principal is plainly dis-

Addition of word "trustee" *descriptio personae*. *Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830. So held where signer's name was followed by the word "Secy." *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811.

⁷³ *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738.

⁷⁴ *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738. As between the parties, parol contemporaneous agreement conditioning delivery is admissible. *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841.

⁷⁵ *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738.

⁷⁶ *Kerby v. Ruegamer*, 107 App. Div. 491, 95 N. Y. Supp. 408.

⁷⁷ *Kerby v. Ruegamer*, 107 App. Div. 491, 95 N. Y. Supp. 408.

⁷⁸ *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Bedford Commercial Ins. Co. v. Covell*, 49 Mass. (8 Metc.) 442; *San Bernardino Nat. Bank v. Anderson* (Cal.) 32 Pac. 168; *Brunswick-Balke-Collender Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Cortland Wagon Co. v. Lynch*, 82 Hun (N. Y.) 173, 31 N. Y. Supp. 325; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; *Lons v. Miller*, 6 Grat. (Va.) 427, 52 Am. Dec. 129; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436. The addition of the word "executor" or "administrator," or the character "adm'r" or "adm'x," to the signature, does not relieve the signer from personal liability. *Jenkins v. Phillips*, 58 N. Y. Supp. 788; *Boyd v. John-*

closed in the body of the instrument, one signing in a representative capacity, or as agent, is not personally liable,⁷⁹ though the signature has no words indicating agency.⁸⁰

SIGNATURE BY "PROCURATION."

§ 26. A signature by "procuration" operates as notice that the authority of the agent is limited.

A signature by "procuration" operates as notice that the authority of the agent is limited; and the principal is bound only in case the agent, in so signing, acted within the actual scope of his authority,⁸¹ except as to bona fide holders.⁸²

DELIVERY — NECESSITY.

§ 27. Every contract in a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto.

The contract evidenced by a negotiable instrument is not com-

ston, 89 Tenn. 284, 14 S. W. 804; *Tassey v. Church*, 4 Watts & S. (Pa.) 346; *White v. Thompson*, 79 Me. 207, 9 Atl. 118; *Hosteller v. Hoke*, 17 Kan. 81; *Morehead Banking Co. v. Moorehead*, 116 N. C. 410, 21 S. E. 190.

⁷⁹ *Whitney v. Inhabitants of Stow*, 111 Mass. 368; *Haskell v. Cornish*, 13 Cal. 45; *Little v. Bailey*, 87 Ill. 239. In *Vliet v. Simanton*, 63 N. J. Law, 458, 43 Atl. 738, persons signing as "trustees" a note which recited that "the trustees of M. Grange, No. 114," promise to pay, were held personally liable. To the same effect, see *Day v. Ramsdell*, 90 Iowa, 731, 52 N. W. 208, 57 N. W. 630.

⁸⁰ *Chipman v. Foster*, 119 Mass. 189.

⁸¹ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 21); *Ariz.* (§3324); *Ill.* (§ 21); *Kan.* (§ 28); *Md.* (§ 40); *Mich.* (§ 23); *Neb.* (§ 21); *N. Y.* (§ 40); *Ohio* (§ 3171 t); *R. I.* (§ 29); *Wis.* (§ 1675-21).

This provision was taken verbatim from the English "Bills of Exchange Act 1882" (45 & 46 Vict. c. 61), § 25. See *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Bryant v. La Banque* [1893] App. Cas. 170.

⁸² *Bryant v. La Banque* [1893] App. Cas. 170, 180.

plete, and is revocable until delivery of the instrument for the purpose of giving effect thereto.⁸³ Delivery means the transfer of possession, actual or constructive, from one person to another.⁸⁴ So, if the maker destroy the instrument after signature, but before delivery, no recovery can be had thereon by the payee as upon a lost instrument.⁸⁵ But this provision does not render a note delivered to the payee and indorsed in blank, and thereafter stolen by the maker and sold to a bona fide holder, incomplete.⁸⁶

SUFFICIENCY OF DELIVERY.

§ 28. As against all parties, except a holder in due course, a delivery, to be effectual, must be made by or under the authority of the person making, drawing, accepting, or indorsing, and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument.

As against all parties except a bona fide holder, a delivery, to

⁸³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 16); Ariz. (§ 3319); Ill. (§ 16); Kan. (§ 23); Md. (§ 35); Mich. (§ 18); Neb. (§ 16); N. Y. (§ 35); Ohio (§ 3171 o); R. I. (§ 24); Wis. (§ 1675-16).

Polhemus v. Prudential Realty Corp., 74 N. J. Law, 570, 67 Atl. 303; *Wells Fargo & Co. v. Vansickle*, 64 Fed. 944; *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Devries & Co. v. Shumate*, 53 Md. 211; *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70; *Chipmunt v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1; *Roberts v. McGrath*, 38 Wis. 52; *Wright v. Smith*, 81 Va. 777; *Hoit v. McIntire*, 50 Minn. 466, 52 N. W. 918. Bill of exchange payable to the order of the drawer does not come into existence as such until it is delivered, as well as indorsed, by the payee. *Stouffer v. Curtis*, 198 Mass. 560, 85 N. E. 180.

⁸⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 191); Ariz. (§ 3487); Ill. (§ 190); Kan. (§ 2); Md. (§ 14); Mich. (§ 2); Neb. (§ 189); N. Y. (§ 2); Ohio (§ 3178); R. I. (§ 2); Wis. (§ 1675).

⁸⁵ *Sheehan v. Crosby*, 58 Ind. 205.

⁸⁶ *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959.

be effectual, must be made by or under the authority of the person making, drawing, accepting, or indorsing.⁸⁷ An instrument taken by the payee without the maker's consent is ineffectual for want of delivery.⁸⁸ Nor can a recovery be had where a delivery was obtained by force or fraud.⁸⁹ A delivery to the payee in a sealed envelope,⁹⁰ or by mailing the instrument to him,⁹¹ is sufficient, and a sufficient constructive delivery takes place where the instrument is left in a place accessible to the payee.⁹² After an instrument signed and delivered in blank has been completed, it relates back to the time of the original delivery, and a second delivery is not necessary.⁹³

Conditional delivery.

As against all parties except a bona fide holder, the delivery may be shown to be conditional, and for a specific purpose, and not for the purpose of transferring the property in the instrument,⁹⁴ and the fact that such condition rests in a parol agree-

⁸⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 16); Ariz. (§ 3319); Ill. (§ 16); Kan. (§ 23); Md. (§ 35); Mich. (§ 18); Neb. (§ 16); N. Y. (§ 35); Ohio (§ 3171 o); R. I. (§ 24); Wis. (§ 1675-16).

⁸⁸ *Hatton v. Jones*, 78 Ind. 466; *Roberts v. McGrath*, 38 Wis. 52; *Dodd v. Dunne*, 71 Wis. 578, 37 N. W. 430.

⁸⁹ *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497.

⁹⁰ *Worth v. Case*, 42 N. Y. 362.

⁹¹ *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777; *Kirkman v. Bank of America*, 42 Tenn. (2 Cold.) 397.

⁹² *Norton v. Norton*, 1 N. Y. Supp. 552; *Babcock v. Benson*, 58 Hun, 601, 11 N. Y. Supp. 455.

⁹³ *Davidson v. Lanier*, 71 U. S. (4 Wall.) 447.

⁹⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 16); Ariz. (§ 3319); Ill. (§ 16); Kan. (§ 23); Md. (§ 35); Mich. (§ 18); Neb. (§ 16); N. Y. (§ 35); Ohio (§ 3171 o); R. I. (§ 24); Wis. (§ 1675-16).

Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831. See, also, *Burke v. Dulaney*, 153 U. S. 228, 38 Law. Ed. 698; *Zimmerman v. Adey*, 126 Ind. 15, 25 N. E. 828; *Devries v. Shumate*,

ment contemporaneous with delivery does not prevent its being proven.⁹⁵ The condition and its nonfulfillment being shown, the contract has no binding validity.⁹⁶

SAME—PRESUMPTIONS.

§ 29. Nonpossession may raise a presumption of delivery.

Where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved,⁹⁷ and possession by the payee or a party other than the signer is *prima facie* evidence of delivery,⁹⁸ and ownership,⁹⁹ but possession by a

53 Md. 211; *Watkins v. Bowers*, 119 Mass. 383; *Bernhard v. Brunner*, 17 N. Y. Super. Ct. (4 Bosw.) 528; *Bookstaver v. Jayne*, 60 N. Y. 146; *Garfield Nat. Bank v. Colwell*, 57 Hun, 169, 10 N. Y. Supp. 864; *French v. Wallack*, 12 N. Y. St. Rep. 159, 62 Am. Dec. 152; *Bank of Benson v. Jones*, 147 N. C. 419, 61 S. E. 193. But see *Mead v. Nat. Bank of Pawling*, 89 Hun, 102, 34 N. Y. Supp. 1054.

⁹⁵ *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831; *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192. Proof of such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous parol agreement. *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192.

⁹⁶ *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192.

⁹⁷ *Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo.* (§ 16); *Ariz.* (§ 3319); *Ill.* (§ 16); *Kan.* (§ 23); *Md.* (§ 35); *Mich.* (§ 18); *Neb.* (§ 16); *N. Y.* (§ 35); *Ohio* (§ 3171 o); *R. I.* (§ 24); *Wis.* (§ 1675-16).

⁹⁸ *Bellows v. Folsom*, 27 N. Y. Super. Ct. (4 Rob.) 43; *Garrigus v. Home, Frontier & Foreign Missionary Soc.*, 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262. In a suit upon a promissory note, where the plaintiff has possession of the note, produces it upon the trial, and it is received in evidence, such facts make a *prima facie* case of delivery of the note. *Gandy v. Bissell's Estate*, 81 Neb. 102, 115 N. W. 571.

⁹⁹ The presumption of ownership arising from possession by the original payee is not affected by the fact that the note bears the blank indorsement of such payee. *Home Sav. Bank v. Stewart*, 78 Neb. 624, 110 N. W. 947. See, also, *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1.

sister of the payee is not sufficient to raise the presumption.¹⁰⁰ This presumption from possession by the payee may be rebutted by evidence that the delivery was on a contingency which had not happened.¹⁰¹

¹⁰⁰ Gordon v. Adams, 127 Ill. 223, 19 N. E. 557.

¹⁰¹ Hurt v. Ford (Mo.) 36 S. W. 671.

CHAPTER IV.

ESSENTIALS OF NEGOTIABILITY.

- § 30. In General.
- § 31. Substantial Compliance Sufficient.
- § 32. Matters Not Affecting Negotiability.
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 - 3. Failure to Specify Value.
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- § 33. The Promise or Order.
- § 34. There Must be a Promise or Order to Pay.
 - Warehouse Receipts and Bills of Lading.
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- § 36. Unconditional though contains:
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- § 37. Instruments Payable Out of Particular Fund.
 - Municipal Warrants and Orders.
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- § 39. Sum Payable is a Sum Certain Though Payable.
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 - 2. By Stated Instalments.
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- § 40. Provision for Taxes.
- § 41. Must be Payable in Money.
- § 42. Certainty as to Time of Payment.
- § 43. Instruments Payable on Demand.
- § 44. Overdue Paper.
- § 45. Fixed or Determinable Future Time.

- § 46. Instrument Payable on Contingency.
- § 47. Fixed or Determinable Future Time—Prior Contingency.
- § 48. Words of Negotiability.
- § 49. Supplied by Indorsement.
- § 50. Instruments Payable to Order.
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- § 52. Certainty as to Parties.
- § 53. Designation of Drawee.
- § 54. Joint Drawees.
- § 55. Place of Payment.
- § 56. No Place of Payment Specified.
- § 57. Provisions Not Affecting Negotiability.
 - 1. Sale of Collateral; Conditional Sale Notes.
 - 2. Confession of Judgment.
 - 3. Waiving Statutory Rights.
 - 4. Option to Require Something in Lieu of Payment of Money.
- § 58. Illegal Provisions.

IN GENERAL.

- § 30. An instrument to be negotiable must conform to the following requirements:¹
- 1. It must be in writing and signed by the maker or drawer;
 - 2. Must contain an unconditional promise or order to pay a sum certain in money;
 - 3. Must be payable on demand, or at a fixed or determinable future time;
 - 4. Must be payable to order or to bearer; and
 - 5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

There are certain essentials of negotiability, such as a written instrument, and a signature by the maker or drawer, which are primarily essentials to the valid execution of the instrument, and such questions are considered in the chapter on "Exe-

¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

cution and Delivery," because more properly falling under that heading.²

§ 31. Substantial compliance with the requirements of the negotiable instruments law is sufficient.

While the negotiable instruments law provides that an instrument to be negotiable "must conform" to certain specific requirements,³ a strict following of the language of the law is not required, but any terms are sufficient which clearly indicate an intention to conform to the statutory requirements.⁴

§ 32. The negotiability of an instrument is not affected by the fact:

1. That it is not dated; or
2. That it bears a seal; or
3. That it does not specify the value given or that any value was given.

Exception.—But nothing herein alters or repeals any statute requiring, in certain cases, the nature of the consideration to be stated in the instrument.

Date.

As heretofore stated, the validity of the instrument is not affected by the fact that it is not dated,⁵ and the same rule applies

² See ante, chapter III.

³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 10); Ariz. (§ 3313); Ill. (§ 10); Kan. (§ 17); Md. (§ 29); Mich. (§ 12); Neb. (§ 10); N. Y. (§ 29); Ohio (§ 3171 i); R. I. (§ 18); Wis. (§ 1675-10).

⁵ See ante, chapter III. Execution and Delivery, § 13.

to its negotiable character.⁶ Not being dated, it will be considered to be dated as of the time it was issued.⁷

Seal.

The old common-law rule that a seal placed on an instrument renders it a specialty, and hence non-negotiable, is still in force, except as modified or abolished by statute.⁸ Corporate paper is an exception to the general rule, and is not rendered non-negotiable at common law by the presence of the corporate seal,⁹ the

⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 6); Ariz. (§ 3309); Ill. (§ 6); Kan. (§ 13); Md. (§ 25); Mich. (§ 8); Neb. (§ 6); N. Y. (§ 25); Ohio (§ 3171 e); R. I. (§ 14); Wis. (§ 1675-6).

Church v. Stevens, 56 Misc. 572, 107 N. Y. Supp. 310.

⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 17); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

See ante, chapter IV. Execution and Delivery, § 14.

⁸ Rawson v. Davidson, 49 Mich. 607, 14 N. W. 565; Lewis v. Wilson, 5 Blackf. (Ind.) 370; Brown v. Jordahl, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560. But see Laws Minn. 1899, c. 86, abolishing private seals, and providing that the addition of such a seal shall not affect the character of an instrument in any respect.

⁹ Corporate bonds, see American Nat. Bank v. American Wood-Paper Co., 19 R. I. 149, 32 Atl. 305; Evertson v. National Bank of Newport, 66 N. Y. 14.

Interest coupons detached from negotiable bonds are negotiable. International Imp. Fund Trustees v. Lewis, 34 Fla. 424, 16 So. 325, 43 Am. St. Rep. 209, 26 L. R. A. 743; Evertson v. National Bank of Newport, 66 N. Y. 14; Nashville v. First Nat. Bank, 60 Tenn. (1 Baxt.) 402. Corporate notes, see Jackson v. Myers, 43 Md. 452, where there was a printed representation of the corporate seal on the face of the note; Chase Nat. Bank v. Faurot, 72 Hun, 373, 25 N. Y. Supp. 447; Id., 149 N. Y. 532, 44 N. E. 164, and Weeks v. Esler, 143 N. Y. 374, 38 N. E. 377, in which sealed corporate notes were held negotiable, in the absence of any showing that the parties intended to affix seals; Mackey v. St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881, where a corporate note, sealed, but not with the corporate seal, was held negotiable. The New

theory being, generally, that the affixing of the corporate seal is a necessary part of the execution of the instrument.¹⁰ The common-law rule has been abolished by the negotiable instruments law by an express provision that an instrument is negotiable though it bears a seal.¹¹

It follows that, where the negotiable instruments laws are in force, the distinction and refinements made by the courts in determining what constitutes a seal¹² are useless learning, so far as the question of negotiability is concerned.

York negotiable instruments law (§ 332) provides that the owner or holder of any corporate municipal bond or obligation issued and payable within the state, but not registered, may make such bond or obligation, or the interest coupon accompanying it, non-negotiable by subscribing his name to a statement indorsed thereon, that such bond, obligation, or coupon is his property.

¹⁰ But see *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 324 (413); *Bank of Columbia v. Patterson*, 11 U. S. (7 Cranch) 305, 3 Law. Ed. 540.

¹¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 6); Ariz. (§ 3309); Ill. (§ 6); Kan. (§ 13); Md. (§ 25); Mich. (§ 8); Neb. (§ 6); N. Y. (§ 25); Ohio (§ 3171 e); R. I. (§ 14); Wis. (§ 1675-6).

Addition of seal to maker's signature does not affect negotiable character of note. *Arnd v. Heckert*, 108 Md. 300, 70 Atl. 416; *St. Paul's Episcopal Church v. Fields*, 81 Conn. 670, 72 Atl. 144.

Of the states that have adopted the negotiable instruments law, the following previously had statutes making sealed instruments negotiable: Colo., Fla., Ill., Kan., Mass., Nev., N. C., Ohio, Tenn. *Pate v. Brown*, 85 N. C. 166. But see *Borden v. Southerland*, 70 N. C. 528; *Spense v. Tapscott*, 93 N. C. 246. In the following sealed instruments were formerly assignable merely, subject to defense: Md. (Pub. Gen. Laws, art. 8, §§ 3, 9), Va. (Code, § 2860), Wis. (Sanb. & B. Ann. St. §§ 2605, 2606), D. C. (Comp. St. c. 6, § 3).

The negotiable instruments law changes the rule in Oregon. See *D. M. Osborne & Co. v. Hubbard*, 20 Or. 318, 11 L. R. A. 833. But not in New York. *Chase Nat. Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164.

¹² *Clegg v. Lemessurier*, 15 Grat. (Va.) 108; *Andrews v. Herriot*, 4 Cow. (N. Y.) 508; *Bates v. Boston & N. Y. Cent. R. Co.*, 92 Mass. (10 Allen) 251; *Duncan v. Duncan*, 1 Watts (Pa.) 322; *D. M. Osborne & Co. v. Hubbard*, 20 Or. 318, 11 L. R. A. 833.

In Minnesota an instrument, otherwise a negotiable promissory note, but having the word "Seal" in brackets opposite the name of the maker,

Failure to specify value.

The negotiability of an instrument is not affected by the fact that it does not specify the value given, or that any value was given.¹³ This rule is merely a specific application of the general rule that a consideration for a negotiable instrument is presumed,¹⁴ and is declaratory of the law, for, in the absence of statute, it has been uniformly held that the words "value received," or their equivalent, are not necessary to negotiability.¹⁵

Exception.

The negotiable instruments law provides that nothing in the section relating to setting out the consideration shall repeal any statute requiring the nature of the consideration to be stated in the instrument.¹⁶ These provisions refer to such statutes as that of Wisconsin, which provides that notes taken by any fire insurance company for the issuance of a policy shall have written in the body thereof the words "given in payment for a policy of insurance, and, if transferred before or after maturity, shall remain subject to all defenses;"¹⁷ and the statute of New York, which requires notes given for a patent right to contain the words "given for a patent right," and one given for the purpose

was held to be a sealed instrument, and not negotiable, though there was no reference to the seal in the body of the note. *Brown v. Jordahl*, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560.

¹³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 6); Ariz. (§ 3309); Ill. (§ 6); Kan. (§ 13); Md. (§ 25); Mich. (§ 8); Neb. (§ 6); N. Y. (§ 25); Ohio (§ 3171 e); R. I. (§ 14); Wis. (§ 1675-6).

¹⁴ See post, § 59.

¹⁵ *Archer v. Claflin*, 31 Ill. 306; *Benjamin v. Tillman*, 2 McLean, 213, Fed. Cas. No. 1,304; *Coursin v. Ledlie's Adm'r*, 31 Pa. 506.

¹⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 6); Ariz. (§ 3309); Ill. (§ 6); Kan. (§ 13); Md. (§ 25); Mich. (§ 8); Neb. (§ 6); N. Y. (§ 25); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-7).

¹⁷ Rev. St. 1878, § 1944. This section was not repealed by the negotiable instruments law.

of speculation in farm products to state that it is "given for a speculative consideration."¹⁸ At one time there was considerable doubt as to the constitutionality of a statute requiring notes given for patent rights to recite that fact, but such statutes are now generally considered as constitutional.¹⁹

THE PROMISE OR ORDER.

§ 33. The instrument must contain:

1. A promise or order;
2. Unconditional in terms;
3. To pay a sum certain.

§ 34. There must be a promise or order to pay.

Both at common law and under the negotiable instruments act²⁰ there must be a promise or order to pay. What constitutes a "promise" sufficient to make an instrument a promissory note has been a frequent subject of judicial investigation. In the absence of statute, it has generally been held that an acknowledgment of indebtedness, either in the form of a duebill or an "I. O. U.," does not contain a sufficient promise, and in fact is not a new obligation, but merely new evidence of the old debt.²¹ Where a writing contains nothing more than a bare acknowledgment of a debt, it does not, in legal construction, import an ex-

¹⁸ Negotiable Inst. Law, §§ 330, 331.

¹⁹ *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; *Herdic v. Roessler*, 109 N. Y. 127, 16 N. E. 198. A similar statute was held unconstitutional in Minnesota as an attempt to regulate the sale of patent rights granted pursuant to acts of congress. *Crittenden v. White*, 23 Minn. 24, 23 Am. Rep. 676.

²⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or. Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675).

²¹ *Gray v. Bowden*, 40 Mass. (23 Pick.) 282; *Gay v. Rooke*, 151 Mass. 115, 23 N. E. 835, 21 Am. St. Rep. 434; *Pepoon v. Staggs & Co.*, 1 Nott & McC. (S. C.) 102; *Currier v. Lockwood*, 40 Conn. 349, 16 Am. Rep. 40.

press promise to pay.²² The doctrine of implied promise has, however, been applied to sustain the negotiability of instruments of this nature.²³ So it has been held that an instrument reciting "good to R. C., or order, for thirty dollars borrowed money," contained a sufficient promise, and was negotiable.²⁴ Also "that one in the words "due A on corn, \$525," was negotiable.²⁵ A promise to be "accountable" is equivalent to a promise to pay,²⁶ but a mere statement that "I owe the estate of W." a certain sum is not a negotiable, promissory note.²⁷ The sufficiency of the "order" in a bill of exchange is governed by similar principles, and a direction to "please let the bearer have \$50. I will arrange it with you this noon," was held to be a bill of exchange, and not a mere covenant.²⁸ But a direction to "credit A., or bearer, \$30, and I will pay you," does not constitute a good bill.²⁹

Same—Warehouse receipts and bills of lading.

Warehouse receipts and bills of lading are usually treated as quasi negotiable instruments, on the ground that they do not contain a sufficiently definite promise, and are not payable in money.³⁰ In some states receipts issued by certain warehouse and storage companies are still negotiable, for the statute giving them

²² *Smith v. Allen*, 5 Day (Conn.) 337.

²³ *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39; *Lee v. Balcom*, 9 Colo. 126, 11 Pac. 74; *Smith v. Allen*, 5 Day (Conn.) 337; *Harrow v. Dugan*, 36 Ky. (6 Dana) 341.

²⁴ *Franklin v. March*, 6 N. H. 364, 25 Am. Dec. 462. But see *Brown v. Gilman*, 13 Mass. 158.

²⁵ *Jaquin v. Warren*, 40 Ill. 459.

²⁶ *Morris v. Lee*, 1 Strange, 629.

²⁷ *Bowles v. Lambert*, 54 Ill. 237.

²⁸ *Biesenthall v. Williams*, 62 Ky. (1 Duv.) 329, 85 Am. Dec. 629.

The word "please," or words of similar import, do not affect the negotiability of the bill. *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522; *Jarvis v. Wilson*, 46 Conn. 90, 33 Am. Rep. 18; *Biesenthall v. Williams*, 62 Ky. (1 Duv.) 329, 85 Am. Dec. 629; *Mehlberg v. Tisher*, 24 Wis. 607.

²⁹ *Wooley v. Sergeant*, 8 N. J. Law, 262, 14 Am. Dec. 419.

³⁰ But see *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281.

negotiability³¹ was not repealed by the negotiable instruments laws. In Wisconsin warehouse receipts, bills of lading, and railroad receipts, are negotiable, unless the words "not negotiable" are plainly written, printed, or stamped on the face of the instrument.³²

Same—Certificates of deposit.

A certificate of deposit payable to the order of the depositor is negotiable,³³ and its negotiability is not affected by the fact that a demand is necessary before an action can be maintained on it.³⁴ One not containing a promise to pay is not negotiable, as it is nothing more than a receipt for the money deposited.³⁵ But a certificate of deposit payable to the order of a named person at six months, with interest, is a negotiable, promissory note.³⁶

Same—Receivers' certificates.

A receiver's certificate is not negotiable since it lacks several of the essential elements of negotiability.³⁷ One which contains

³¹ Laws N. Y. 1858, c. 336, § 6 (Laws 1872, c. 881, § 6; 2 Rev. St. 1875, p. 230, § 6). See *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721, citing 143 N. Y. 559; *Corn Exchange Bank v. American Dock & Trust Co.*, 149 N. Y. 174, 43 N. E. 915. The instruments are transferable without indorsement. *Mechanics' Bank of Canada v. Union R. & Transp. Co.*, 69 N. Y. 373.

Scheuermann v. Monarch Fruit Co. (La.) 48 So. 647.

³² Rev. St. 1878, §§ 1676, 4194, 4425. The negotiable instruments law (§ 1675-1, subd. 5) has specially saved these sections from repeal.

³³ *Birch v. Fisher*, 51 Mich. 36, 16 N. W. 220; *First Nat. Bank of Rapid City v. Security Nat. Bank*, 34 Neb. 71, 51 N. W. 305, 33 Am. St. Rep. 618, 15 L. R. A. 386; *Pardee v. Fish*, 60 N. Y. 265; *Baker v. Leland*, 9 App. Div. 365, 41 N. Y. Supp. 399; *Maxwell v. Agnew*, 21 Fla. 154; *Johnson v. Henderson*, 76 N. C. 227; *Lindsey v. McClelland*, 18 Wis. 481, 86 Am. Dec. 786.

Effect of provision for return of certificate, see § 35.

³⁴ *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176.

³⁵ *Hotchkiss v. Mosher*, 48 N. Y. 482.

³⁶ *Bank of Orleans v. Merrill*, 2 Hill (N. Y.) 295; *Beardsley v. Webber*, 104 Mich. 88, 62 N. W. 173.

³⁷ *Turner v. Peoria & S. R. Co.*, 95 Ill. 134.

no express promise to pay, but merely acknowledges an indebtedness, payable out of a particular fund, is not negotiable;³⁸ nor is one which, on its face, recites that it was issued under a special order of court.³⁹

Same—Bank pass books.

A pass book issued by a savings bank is not a negotiable instrument,⁴⁰ though a by-law of the bank, assented to by depositors, provides that the pass books shall be transferable to order.⁴¹ An order signed by a depositor, directing payment to a third person, does not make the books negotiable,⁴² and an assignee of the book cannot sue thereon in his own name.⁴³ On the same theory, an order on a savings bank which recites that the pass book must accompany the order is not negotiable.⁴⁴

§. 35. The promise or order to pay must be unconditional.

Both under the negotiable instruments law,⁴⁵ and at common law,⁴⁶ the instrument to be negotiable must be payable uncondition-

³⁸ Union Trust Co. v. Chicago & L. H. R. Co., 7 Fed. 513.

³⁹ Montreal Bank v. Chicago, C. & W. R. Co., 48 Iowa, 518.

⁴⁰ Smith v. Brooklyn Sav. Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653.

⁴¹ Witte v. Vincenot, 43 Cal. 325.

⁴² McCaskill v. Connecticut Sav. Bank, 60 Conn. 300, 22 Atl. 568, 25 Am. St. Rep. 323, 13 L. R. A. 737.

⁴³ Howard v. Windham County Sav. Bank, 40 Vt. 597.

⁴⁴ White v. Cushing, 88 Me. 339, 34 Atl. 164, 51 Am. St. Rep. 402, 32 L. R. A. 590.

⁴⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

⁴⁶ Knights & Ladies of Security v. Hibernian Banking Ass'n, 137 Ill. App. 175. Instrument directing drawee to pay "upon acceptance" a stated amount is not negotiable. Berenson v. London & Lancashire Fire Ins. Co., 201 Mass. 172, 87 N. E. 687.

⁴⁶ Carnahan v. Pell, 4 Colo. 190; Jennings v. First Nat. Bank, 13 Colo. 417, 22 Pac. 777, 16 Am. St. Rep. 210; First Nat. Bank of Webster v. Alton,

ally. It is not in the rule but in the application of it that the courts differ. In applying the rule it has been held that an order directing payment out of any money the drawee might obtain in a certain suit,⁴⁷ and a promise to pay, provided a railroad be built to a certain place by a certain time,⁴⁸ are not negotiable. Where payment is contingent on whether the payee, before maturity, shall pay a certain mortgage, the instrument is not negotiable.⁴⁹ As to the effect of a provision for payment "on return" of the instrument or of other instruments, there is a conflict of opinion,⁵⁰ though in a recent case, under the act, such a provision was held to render the instrument non-negotiable.⁵¹

60 Conn. 402, 22 Atl. 1010; *Coolidge v. Ruggles*, 15 Mass. 387; *Grant v. Wood*, 78 Mass. (12 Gray) 220; *Cook v. Satterlee*, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432; *Shelton v. Bruce*, 17 Tenn. (9 Yerg.) 24; *First Nat. Bank of Stillwater v. Larsen*, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365.

⁴⁷ *Waters v. Carleton*, 4 Port. (Ala.) 205.

⁴⁸ *Eldred v. Malloy*, 2 Colo. 320, 25 Am. Rep. 752.

⁴⁹ *Hays v. Gwin*, 19 Ind. 19.

⁵⁰ Certificates of deposit providing for payment on return of the certificates are negotiable. *Fellspoint Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Kirkwood v. Exchange Nat. Bank*, 40 Neb. 497, 58 N. W. 1135; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377. But, contra, see *O'Neill v. Bradford*, 1 Pin. (Wis.) 390, 42 Am. Dec. 574; *Lebanon Bank v. Mangan*, 28 Pa. 452; *Patterson v. Poindexter*, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554.

A receipt providing for payment on its return is negotiable. *Frank v. Wessels*, 64 N. Y. 155.

A note providing that it shall be surrendered to the maker on payment of the note to the payee is not negotiable. *Hubbard v. Moseley*, 77 Mass. (11 Gray) 170, 71 Am. Dec. 698. Nor is a note given for stock which provides for payment on surrender of the stock. *Van Zandt v. Hopkins*, 151 Ill. 248, 37 N. E. 845. Nor is an instrument negotiable, payment of which is conditioned on the return of the maker's guarantee of a certain note. *Smilie v. Stevens*, 39 Vt. 315.

⁵¹ A so-called draft, payable "on presentation of certificate No. 32,004, issued by K. & L. of S. to J. K., properly released," is not a negotiable instrument. *Knights & Ladies of Security v. Hibernian Banking Ass'n*, 137 Ill. App. 175. Compare with *Van Zandt v. Hopkins*, 151 Ill. 248, 37 N. E. 845.

§ 36. An unqualified order or promise to pay is unconditional, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

§ 37. But an order or promise to pay out of a particular fund is not unconditional.

Reference to particular fund or account for reimbursement.

Following the common law, the negotiable instruments act provides that an indication of a particular fund, out of which reimbursement is to be made, or a particular account which is to be debited with the amount, does not render an instrument conditional,⁵² a distinction, clear in the law but confused in the application, being here made between those cases wherein there is an indication of the fund to which the payor or drawee is to look for reimbursement and those cases where there is an express or implied direction to pay the instrument out of a particular fund.⁵³ In applying this rule the courts have held that the fact that the instrument contains a direction to "charge" the amount against specified property,⁵⁴ or to "charge" a certain account,⁵⁵

⁵² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 3); Ariz. (§ 3306); Ill. (§ 3); Kan. (§ 10); Md. (§ 22); Mich. (§ 5); Neb. (§ 3); N. Y. (§ 22); Ohio (§ 3171 b); R. I. (§ 11); Wis. (§ 1675-3).

Merely declaratory of common law. *First Nat. Bank v. Lightner*, 74 Kan. 736, 88 Pac. 59, 118 Am. St. Rep. 353, 8 L. R. A. (N. S.) 231.

Receiver's certificates not negotiable, see ante, § 34.

⁵³ See post, § 37. *First Nat. Bank v. Lightner*, 74 Kan. 736, 88 Pac. 59, 118 Am. St. Rep. 353, 8 L. R. A. (N. S.) 231.

⁵⁴ Order to "pay to A. \$40, and charge same against whatever amount may be due me for my share of fish," caught on a certain schooner. *Redman v. Adams*, 51 Me. 429. Direction to "charge the amount against me, and (sic) of my mother's estate." *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737.

⁵⁵ Direction to "charge my salary account." *Shaver v. Western Union Tel. Co.*, 57 N. Y. 459.

or that it is "payable out of" property of the drawer or maker,⁵⁶ or that it is "on account of" a certain contract,⁵⁷ does not render it non-negotiable.

In a recent Alabama case, a stipulation in a note that "the makers and indorsers of this note * * * authorize said bank to appropriate on this note, whether due or not, at any time at its option, without notice or legal proceedings, any money which they, or any one or more of them, may have jointly or severally in said bank, on deposit or otherwise," was held not to destroy negotiability.⁵⁸

Statement of transaction.

Though it is not necessary to state that there was a consideration for an instrument in order to render it negotiable, one which contains a statement of the particular transaction giving rise to the instrument is not thereby rendered non-negotiable.⁵⁹ Thus, a promise to pay a stated sum for the privilege of placing

⁵⁶ On the same theory, a promise to pay "out of any property I may possess." *Chickering v. Greenleaf*, 60 N. H. 51.

An indorsement made by the maker of a note on the back of the instrument that he is the owner of a stated amount of real and personal property does not destroy negotiability. *Hudson v. Emmons*, 107 Mich. 549, 65 N. W. 542. Instrument made payable "out of my share of the grain." *Corbett v. Clark*, 45 Wis. 403, 30 Am. Rep. 763.

⁵⁷ Words "on account of contract between you and Snyder Planing Mill Company" held not a direction to charge a particular fund, but merely indicates the fund to which the drawee is to look for reimbursement. *First Nat. Bank v. Lightner*, 74 Kan. 736, 88 Pac. 59, 118 Am. St. Rep. 353, 8 L. R. A. (N. S.) 231.

⁵⁸ *Louisville Banking Co. v. Gray*, 123 Ala. 251, 26 So. 205.

⁵⁹ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 3); *Ariz.* (§ 3306); *Ill.* (§ 3); *Kan.* (§ 10); *Md.* (§ 22); *Mich.* (§ 5); *Neb.* (§ 3); *N. Y.* (§ 22); *Ohio* (§ 3171 e); *R. I.* (§ 11); *Wis.* (§ 1675-3).

Newton Wagon Co. v. Dier, 10 Neb. 284; *Hereth v. Meyer*, 33 Ind. 511; *Doherty v. Perry*, 38 Ind. 15; *Bank of Sherman v. Apperson & Co.*, 4 Fed. 25; *First Nat. Bank of Salisbury v. Michael*, 96 N. C. 53, 1 S. E. 855.

Conditional sale note not negotiable, see post, § 57.

advertising signs in street cars⁶⁰ is negotiable; and a statement that the note was given for insurance,⁶¹ or for personal property,⁶² or for rent,⁶³ does not destroy its negotiability.

Instruments payable out of particular fund.

An instrument payable out of a particular fund is conditional, and is not negotiable.⁶⁴ The distinction here made by the decisions and by the negotiable instruments laws, between instruments payable out of a particular fund and instruments merely referring to such fund for reimbursement, is close, but is logically sound. It is clear that an instrument payable out of a particular fund is not payable "in any event," but depends for payment on the existence of such a fund, and its sufficiency at the time fixed for payment. While the courts cannot disregard this requirement, that is, that an instrument to be negotiable must not be made payable out of a particular fund or be issued otherwise than upon the general credit of the maker,⁶⁵ still it rests with them to say what facts satisfy this requirement, and they refrain from giving these provisions such a literal or impractical interpretation as will work unexpected and undesirable results.⁶⁶ Viewing the rule from this standpoint it has been held that bonds of a joint stock association which stipulate that no shareholder shall be personally liable as partner or otherwise on them, but that they

⁶⁰ *Siegel v. Chicago Trust & Sav. Bank*, 131 Ill. 569, 23 N. E. 417, 19 Am. St. Rep. 51, 7 L. R. A. 537. See, also, *Chase v. Senn*, 13 N. Y. Supp. 266.

⁶¹ *American Ins. Co. v. Gallahan*, 75 Ind. 168; *Kirk v. Dodge County Mut. Ins. Co.*, 39 Wis. 138, 20 Am. Rep. 39; *Union Ins. Co. v. Greenleaf*, 64 Me. 123; *Taylor v. Curry*, 109 Mass. 36, 12 Am. Rep. 661.

⁶² *Collins v. Bradbury*, 64 Me. 37. See, also, *Preston v. Whitney*, 23 Mich. 260.

Conditional sale note not negotiable, see post, § 57.

⁶³ *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077.

⁶⁴ Same sections of negotiable instruments laws as last above cited.

See, also, *Tradesmen's Nat. Bank of Philadelphia v. Green*, 57 Md. 602; *Harriman v. Sanborn*, 43 N. H. 128; *Parker v. Syracuse*, 31 N. Y. 376; *Cook v. Satterlee*, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432.

⁶⁵ *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108.

⁶⁶ *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108.

shall be payable solely out of certain securing trust assets or out of other assets of the association, are negotiable.⁶⁷ So, also, that an instrument payable out of "the growing substance" of the drawer,⁶⁸ or out of "money in his hands belonging to me,"⁶⁹ are not negotiable, nor are instruments payable out of the proceeds of a sale of certain named property,⁷⁰ nor an order in the form: "Please pay to the order of W. \$600,—the same to be the last \$600 due me on my contract,—and charge the same to my account."⁷¹ But a note payable on a certain day, "or before, if made out of the sale" of specified property, is negotiable,⁷² since it is payable absolutely on the day fixed, if not paid before.

Same—Municipal warrants and orders.

Municipal warrants and orders are not negotiable.⁷³ If not made payable out of a particular fund, they are sometimes treated as negotiable,⁷⁴ but are not considered as commercial paper in the strict sense of the term.⁷⁵ Where, however, a municipal warrant is payable out of "any funds belonging to the city, not before specially appropriated," and is chargeable to the "general city funds," it is negotiable.⁷⁶ By the negotiable instruments law of Wisconsin, no order drawn on or accepted by the treasurer of any county, town, city, village, or school district, is negotiable,

⁶⁷ Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108.

⁶⁸ Josselyn v. Lacier, 10 Mod. 294.

⁶⁹ Averett's Adm'r v. Booker, 15 Grat. (Va.) 165, 76 Am. Dec. 203.

⁷⁰ Virginia v. Turner, 1 Cranch, C. C. 261, Fed. Cas. No. 16,970; De Forest v. Frary, 6 Cow. (N. Y.) 151; Lowery v. Steward, 25 N. Y. 239, 82 Am. Dec. 346; Jackson v. Tilghman, 1 Miles (Pa.) 31.

⁷¹ Woodward v. Smith, 104 Wis. 365, 80 N. W. 440.

⁷² Walker v. Woollen, 54 Ind. 164, 23 Am. Rep. 639; Noll v. Smith, 64 Ind. 511, 31 Am. Rep. 131; Charlton v. Reid, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808; Kiskadden v. Allen, 7 Colo. 206, 3 Pac. 221.

⁷³ Stanton v. Shipley, 27 Fed. 498; Read v. Buffalo, 67 Barb. (N. Y.) 526; Goose River Bank v. Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002.

⁷⁴ See Floyd County Com'rs v. Day, 19 Ind. 450; Brownlee v. Madison County Com'rs, 81 Ind. 186.

⁷⁵ Furgerson v. Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470.

⁷⁶ Bull v. Sims, 23 N. Y. 570.

no matter in what form it is drawn, unless it is expressly made negotiable by law.⁷⁷ In some cases negotiability is denied to municipal warrants and orders on the ground that municipal officers are not authorized to execute negotiable instruments.⁷⁸ The nature of municipal warrants is well stated in *Mayor v. Ray* as follows: "Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders, absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy."⁷⁹

§ 38. The promise or order must be to pay a sum certain.

§ 39. The sum payable is a sum certain within the meaning of the law, although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due; or

⁷⁷ Negotiable Inst. Law, § 1675-1, subd. 5.

⁷⁸ *Dana v. San Francisco*, 19 Cal. 490 (county scrip or warrants); *Camp v. Knox Co.*, 71 Tenn. (3 Lea) 199; *People v. Supervisors*, 11 Cal. 170, where it was held that a county auditor cannot give to a county warrant "the form and qualities" of a bill of exchange.

⁷⁹ *Mayor v. Ray*, 86 U. S. (19 Wall.) 468, 22 Law. Ed. 164. See, also, *Police Jury v. Britton*, 82 U. S. (15 Wall.) 566, 21 Law. Ed. 251; *State v. Cook*, 43 Neb. 318, 61 N. W. 693.

4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

§ 40. But a provision for the payment of taxes or charges renders the sum payable uncertain.

An instrument, to be negotiable, must contain a promise or order to pay a sum "certain."⁸⁰ This provision is elucidated by another stating when the sum payable is a sum certain within the meaning of the act.⁸¹

Provision for interest.

The provision of the negotiable instruments act that the sum payable is a sum certain, although it is to be paid with interest,⁸² is in accordance with the common law. It is usual to provide for payment of interest in promissory notes, and there is no reason why the notes should not still be negotiable if the provisions for interest state a fixed rate for a definite time. A provision for payment of interest on interest to maturity,⁸³ or even for usurious interest,⁸⁴ does not render a note non-negotiable. But a note pay-

⁸⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

A note payable to an insurance company for "\$271.25, with such additional premium as may arise on policy No. 50, issued at the Calais agency," is not negotiable. *Dodge v. Emerson*, 34 Me. 96. See, also, *Cushman v. Haynes*, 37 Mass. (20 Pick.) 132. An order to pay \$300 or what may be due on a specified savings bank book is not negotiable. *National Sav. Bank v. Cable*, 73 Conn. 568, 48 Atl. 428.

⁸¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 2); Ariz. (§ 3305); Ill. (§ 2); Kan. (§ 9); Md. (§ 21); Mich. (§ 4); Neb. (§ 2); N. Y. (§ 21); Ohio (§ 3171a); R. I. (§ 9); Wis. (§ 1675-1).

⁸² Subdivision 1, section negotiable instruments laws last cited.

⁸³ *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 603.

⁸⁴ *Goodin v. Buhler*, 57 Mo. App. 63.

able "with interest the same as savings banks pay"⁸⁵ is not negotiable; nor is one which is payable on or before two years, with interest at a fixed rate, but which provides that it shall not draw interest if paid within one year.⁸⁶ A note providing for a fixed rate of interest if it is paid at maturity, but at a greater rate if not so paid, is negotiable.⁸⁷

Instrument payable in instalments.

An instrument otherwise negotiable is not rendered non-negotiable by a provision for payment in stated or definite instalments.⁸⁸ It has even been held that a promise to pay a certain sum to a corporation in such instalments as its directors may require is negotiable,⁸⁹ on the theory that the instalments are in such case payable on demand. But a promise to pay "at such times and in such articles as the payee may need for her support" is not negotiable.⁹⁰

⁸⁵ *Whitwell v. Winslow*, 124 Mass. 343.

⁸⁶ *Lamb v. Storey*, 45 Mich. 488, 8 N. W. 87.

⁸⁷ *Towne v. Rice*, 122 Mass. 67; *Crump v. Berdan*, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345; *Hollinshead v. John Stuart & Co.*, 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659, and cases cited.

In Minnesota the provision for additional interest after maturity is rejected as a penalty. *Smith v. Crane*, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20. Also in South Dakota. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859, distinguishing *Hegeler v. Comstock*, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393. See, also, *De Hass v. Roberts*, 59 Fed. 853.

A stipulation on the margin of a note that it is to be "discounted at 12 per cent. if paid before maturity" renders the note uncertain as to the amount payable and destroys negotiability. *National Bank of Commerce v. Feeney*, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, 46 L. R. A. 732.

⁸⁸ Subdivision 2, sections negotiable instruments laws last cited. See, also, *Van Buskirk v. Day*, 32 Ill. 260; *Ewer v. Meyrick*, 55 Mass. (1 Cush.) 16; *Wright v. Irwin*, 33 Mich. 32; *Chase v. Behrman*, 10 Daly (N. Y.) 344; *Chase v. Senn*, 13 N. Y. Supp. 266. But see *Chase v. Kellogg*, 13 N. Y. Supp. 351.

⁸⁹ *White v. Smith*, 77 Ill. 351, 20 Am. Rep. 251. See, also, *President, etc., of Goshen & Minisink Turnpike Road v. Hurtin*, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; *Washington County Mut. Ins. Co. v. Miller*, 26 Vt. 77.

⁹⁰ *Corbitt v. Stonemetz*, 15 Wis. 170, 186.

Same—Effect of provision that default shall hasten maturity.

Where an instrument is otherwise negotiable, it is not rendered non-negotiable by a provision for payment by stated instalments, with a further provision that, on default in payment of any instalment, or of interest, the whole shall become due.⁹¹ This provision is illustrated by a case in which it was held that the negotiability of a note which was one of a series, and referred to a contract, was not destroyed by a provision in the contract that the whole series should become payable at the option of the payee on default in payment of any one of the notes.⁹² But a provision that the whole amount shall become due whenever the payee deems himself insecure⁹³ renders a note non-negotiable. So, also, it has been held that a note payable in instalments is made non-negotiable by a provision that the whole amount shall become due on default of any payment, and that the holder could collect the same, with ten per cent for expenses, or could sell the property for which the note was given, and that, if there was any deficiency after sale, the maker would pay it on demand.⁹⁴ Under this provision it has also been held that a note for a specified sum and payable at a certain future date is negotiable, though it provides that the holder may declare the whole amount due on de-

⁹¹ Subdivision 3, same sections of negotiable instruments laws as last above cited.

Hollinshead v. John Stuart & Co., 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659, citing Chicago R. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 34 Law. Ed. 349; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Ernst v. Steckman, 74 Pa. 13, 15 Am. Rep. 542; Cisne v. Chidester, 85 Ill. 523; Walker v. Woollen, 54 Ind. 164, 23 Am. Rep. 639; De Hass v. Roberts, 59 Fed. 853.

⁹² Markey v. Corey, 108 Mich. 184, 66 N. W. 493, 62 Am. St. Rep. 698, 36 L. R. A. 117.

⁹³ Smith v. Marland, 59 Iowa, 645, 13 N. W. 852; First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604. Contra, see Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811.

⁹⁴ W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100.

fault in payment of any instalment of interest or failure to comply with any of the conditions of a securing mortgage.⁹⁵

Provision for exchange.

The negotiable instruments laws have taken a stand apparently against the weight of authority by providing that the sum payable is certain, though the instrument is payable "with exchange, whether at a fixed rate or at the current rate."⁹⁶ Instruments with such provisions have heretofore, in most jurisdictions, been considered as non-negotiable.⁹⁷ In the definitions of a promissory note or bill of exchange, it is generally, if not always, stated that the amount necessary to discharge it must be ascertainable from the face of the paper itself, without having to refer to any extrinsic evidence. Construing this definition literally, it must be admitted that the instruments sanctioned by the statute do not strictly fall within it, for, of course, extrinsic evidence must be resorted to in order to ascertain the rate of ex-

⁹⁵ *Thorp v. Windeman*, 123 Wis. 149, 101 N. W. 417, 107 Am. St. Rep. 1003. See, also, *Stark v. Olson*, 44 Neb. 646, 63 N. W. 37; *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; *Phelps v. Sargent*, 69 Minn. 118, 71 N. W. 927; *American Nat. Bank v. American Wood-Paper Co.*, 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103. See, also, cases cited in note 91, *supra*.

⁹⁶ Subdivision 4, sections of negotiable instruments law last above cited. The negotiable instruments laws change the rule in D. C., Iowa, N. C., Wis. See *Russell v. Russell*, 8 D. C. (1 McArthur) 263; *First Nat. Bank v. Bynum*, 84 N. C. 24; *Morgan v. Edwards*, 53 Wis. 599, 11 N. W. 21, 40 Am. Rep. 365; *First Nat. Bank of Stillwater v. Larsen*, 60 Wis. 206, 19 N. W. 67, 40 Am. Rep. 781; *Peterson v. Stoughton State Bank*, 78 Wis. 113, 47 N. W. 368; *Culbertson v. Nelson*, 93 Iowa, 187, 61 N. W. 854, 27 L. R. A. 222.

⁹⁷ *Windsor Sav. Bank v. McMahon*, 38 Fed. 283, 3 L. R. A. 192; *Hughitt v. Johnson*, 28 Fed. 865; *Culbertson v. Nelson*, 93 Iowa, 187, 57 Am. St. Rep. 266, 27 L. R. A. 222; *Read v. McNulty*, 12 Rich. Law (S. C.) 445. Provision is for "exchange and costs of collection." *Second Nat. Bank of Aurora v. Basuier*, 12 C. C. A. 517, 65 Fed. 58; *Nicely v. Commercial Bank*, 15 Ind. App. 563, 44 N. E. 563. For exchange on a place different from the place of payment. *Read v. McNulty*, 12 Rich. Law (S. C.) 445; *Flagg v. School Dist. No. 70*, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363. But an instrument payable at the place where it is drawn is negotiable,

change at a given time between two places.⁹⁸ However, the reason and purpose of the rule that the sum to be paid must be certain is that the parties to the instrument may know the amount necessary to discharge it, without investigating facts not within the general knowledge of every one, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or another of the parties to the instrument. The provision for the payment of the current rate of exchange between the place of payment and some other place is not within the reason of this rule, or subject to the evils or inconveniences which it was designed to prevent. While the rate of exchange is not always the same, and while it is technically true that resort must be had to extrinsic evidence to ascertain what it is, yet the current rate of exchange between two places at a particular date is a matter of common commercial knowledge, or at least easily ascertainable by any one, so that the parties can always, without difficulty, ascertain the exact amount necessary to discharge the paper. It would seem, therefore, that within the spirit of the rule requiring precision in the amount to be paid, a provision for the payment of the current rate of exchange in addition to the principal amount named does not introduce such an element of uncertainty as deprives the instrument of the essential qualities of a promissory note.⁹⁹

Provision for costs or attorneys' fees.

Negotiability is not destroyed by a provision in the instrument for payment of costs of collection or an attorney's fee in case payment shall not be made at maturity.¹⁰⁰ The courts in

though it provides for exchange, the provision in such case being nugatory. *Hill v. Todd*, 29 Ill. 101; *Christian County Bank v. Goode*, 44 Mo. App. 129; *Orr v. Hopkins*, 3 N. M. 45, 1 Pac. 181.

⁹⁸ *Hastings v. Thompson*, 54 Minn. 184, 55 N. W. 968, 40 Am. St. Rep. 315, 21 L. R. A. 178.

⁹⁹ *Hastings v. Thompson*, 54 Minn. 184, 55 N. W. 968, 40 Am. St. Rep. 315, 21 L. R. A. 178.

¹⁰⁰ Subdivision 5, same sections of negotiable instruments laws as last above cited. *McCornick v. Swem* [Utah] 102 Pac. 626; *First Nat. Bank v. Miller*, 139 Wis. 126, 120 N. W. 820.

the various states have been nearly evenly divided on the question of the negotiability of instruments with such provisions. If the weight of authority can be said to be one way, it probably leans toward the rule as stated here.¹⁰¹ The federal courts have uniformly held that provisions for costs of collection and attorneys' fees do not destroy negotiability.¹⁰² Where the provision for an attorney's fee is void as a provision for a penalty,¹⁰³ or is

¹⁰¹ That such instruments are negotiable has been decided in the following cases: *Louisville Banking Co. v. Gray*, 123 Ala. 251, 26 So. 205, 82 Am. St. Rep. 120; *First Nat. Bank v. Slaughter*, 98 Ala. 602, 14 So. 545, 39 Am. St. Rep. 88; *Stapleton v. Louisville Banking Co.*, 95 Ga. 802, 23 S. E. 81; *Jones v. Crawford*, 107 Ga. 318, 33 S. E. 51, 45 L. R. A. 105; *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, 18 L. R. A. 428; *Proctor v. Baldwin*, 82 Ind. 370; *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 273, 56 N. W. 458, 48 Am. St. Rep. 381; *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 603; *Clifton v. Bank of Aberdeen*, 75 Miss. 929, 23 So. 394; *Benn v. Kutzschau*, 24 Or. 28, 32 Pac. 763; *Oppenheimer v. Farmers' & Merchants' Bank*, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778, 33 L. R. A. 767; *Second Nat. Bank v. Anglin*, 6 Wash. 403, 33 Pac. 1056; *Salisbury v. Stewart*, 15 Utah, 308, 49 Pac. 777, 62 Am. St. Rep. 934; *Stadler v. First Nat. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 600. That such instruments are not negotiable has been decided in the following cases: *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224, in which the provision considered was for a five per cent. fee on the accrued principal and interest in case of suit; *Maryland Fertilizing & Mfg. Co. v. Newman*, 60 Md. 584, 45 Am. Rep. 750; *Cayuga County Nat. Bank v. Purdy*, 56 Mich. 6, 22 N. W. 93; *Altman v. Rittershofer*, 68 Mich. 287, 36 N. W. 74, 13 Am. St. Rep. 341; *Jones v. Radatz*, 27 Minn. 240, 6 N. W. 800; *First Nat. Bank v. Gay*, 71 Mo. 627; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *First Nat. Bank of Decorah v. Laughlin*, 4 N. D. 391, 61 N. W. 473; *Johnston v. Speer*, 92 Pa. 227, 37 Am. Rep. 675; *First Nat. Bank of Stillwater v. Larsen*, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365; *Peterson v. Stoughton State Bank*, 78 Wis. 113, 47 N. W. 368. It will be seen from the above decisions that the negotiable instruments laws have affirmed the rule previously in force in Oregon, Tennessee, Washington, and Utah; but has changed the rule previously in force in Maryland, North Carolina, North Dakota, Pennsylvania and Wisconsin.

¹⁰² *Wilson Sewing Mach. Co. v. Moreno*, 7 Fed. 806; *Adams v. Addington*, 16 Fed. 89; *Schlesinger v. Arline*, 31 Fed. 648; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. 191, 17 L. R. A. 595.

¹⁰³ *Boozar v. Anderson*, 42 Ark. 167; *Bullock v. Taylor*, 39 Mich. 137.

forbidden by statute,¹⁰⁴ it does not destroy negotiability. The negotiable instruments law of North Carolina provides that nothing in the act shall allow enforcement of the provision for costs of collection or attorneys' fees, though the provision does not affect negotiability.¹⁰⁵ The reason why the ordinary provision for an attorney's fee does not destroy negotiability is given by Magruder, J., in *Dorsey v. Wolff*, as follows: "The promise to pay the attorney's fee is a promise to do something after the note matures. It does not affect the character of the note before or up to the time of its maturity, either as to certainty in the amount to be paid, or fixedness in the date of payment, or definiteness in the description of the person to whom the payment is to be made."¹⁰⁶ The court in this case states, however, that a provision for attorneys' fees so worded as to render the amount payable at maturity uncertain would destroy negotiability. The same reason is given in a leading Iowa case, where the court said: "When they (the notes in suit) matured, no inquiry was necessary to be made as to facts not apparent on the face of the notes, in order to fix the amount due. Recovery could have been had upon the notes themselves, without other evidence. The agreement for the payment of attorneys' fees in no sense increased the amount of money payable when the notes fell due, and we are unable to see that it rendered that amount uncertain in the least degree."¹⁰⁷

33 Am. Rep. 356; *Rixy v. Pearre*, 89 Va. 113, 15 S. E. 498. But see *Negotiable Inst. Law Va.* (§ 2, subd. 5).

¹⁰⁴ *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439, the statute involved being Laws 1889, c. 16, § 1.

Conditional agreements for attorneys' fees are void in Indiana (Rev. St. 1881, § 5518), but unconditional stipulations for such fees are valid. *Garver v. Pontious*, 66 Ind. 191; *Tuley v. McClung*, 67 Ind. 10; *Harvey v. Baldwin*, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222. The Indiana statute does render void an agreement to pay attorneys' fees on the implied condition that they shall be payable only in case of dishonor. *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 17 L. R. A. 595.

¹⁰⁵ *Negotiable Inst. Law*, § 197.

¹⁰⁶ *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 395, 34 Am. St. Rep. 99, 18 L. R. A. 428.

¹⁰⁷ *Sperry v. Horr*, 32 Iowa, 184.

Provision for payment of taxes or charges.

The negotiable instruments laws do not expressly provide for instruments containing provisions for payment of taxes or charges; but, under the law merchant, which is to control in cases not provided for,¹⁰⁸ such provisions render an instrument non-negotiable.¹⁰⁹ Thus, where a provision in a note was for the payment of all taxes and charges that might be levied on the note, or on a mortgage which it secured, or on the principal or interest money, the instrument was not negotiable.¹¹⁰ Also, where a note referred to a mortgage which required payment of all taxes and assessments before they became delinquent, in default of which the note should become immediately due and payable, the note was not negotiable,¹¹¹ though it has been held that where the maker of a note, negotiable on its face, executed at the same time a deed of trust to secure it, a covenant in such deed that, on default in payment of taxes by the grantor, the grantee might pay them, in which case the amount thereof should be added to the debt, the provision as to taxes did not render the amount uncertain.¹¹²

§ 41. The instrument must be payable in money, though it is immaterial that it designates the particular kind of current money in which payment is to be made.

The requirement of the negotiable instruments laws that the promise shall be to pay a sum certain in "money"¹¹³ is declaratory of the law.¹¹⁴

¹⁰⁸ See ante, § 4.

¹⁰⁹ Walker v. Thompson, 108 Mich. 686, 66 N. W. 584; Carmody v. Crane, 110 Mich. 508, 68 N. W. 268; Howell v. Todd, Fed. Cas. No. 6,783.

¹¹⁰ Farquhar v. Fidelity Ins. Co., Fed. Cas. No. 4,676.

¹¹¹ Wistrand v. Parker, 7 Kan. App. 562, 52 Pac. 59.

¹¹² Frost v. Fisher, 13 Colo. App. 322, 58 Pac. 872.

¹¹³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

¹¹⁴ Hodges v. Clinton, 1 N. C. 79; Fry v. Rousseau, 3 McLean, 106, Fed. Cas. No. 5,141.

Instruments may be payable in particular kind of current money.

The negotiable character of an instrument is not affected by the fact that it designates a particular kind of current money in which payment is to be made.¹¹⁵ Thus, an instrument is payable in money if payable in "pounds sterling,"¹¹⁶ or in "cash notes,"¹¹⁷ or in "gold dollars,"¹¹⁸ or in "Mex. silv. dollars;"¹¹⁹ but is not payable in money if payable in "bank stock,"¹²⁰ or in "current bank notes,"¹²¹ or in "current funds,"¹²² or in "currency."¹²³ A note payable at New York "in New York funds, or their equivalent," is not negotiable because "the term 'New York funds,' it is presumed, may embrace stocks, bank notes, specie, and every description of currency which is used in commercial transactions."¹²⁴ But a note payable in "bank notes

¹¹⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 6); Ariz. (§ 3309); Ill. (§ 6); Kan. (§ 13); Md. (§ 25); Mich. (§ 8); Neb. (§ 6); N. Y. (§ 25); Ohio (§ 3171 e); R. I. (§ 14); Wis. (§ 1675-6).

¹¹⁶ King v. Hamilton, 12 Fed. 478.

¹¹⁷ See Ward v. Lattimer, 2 Tex. 245.

¹¹⁸ Chrysler v. Renois, 43 N. Y. 209.

¹¹⁹ Hogue v. Williamson, 85 Tex. 553, 34 Am. St. Rep. 823, 20 L. R. A. 481.

¹²⁰ Markley v. Rhodes, 59 Iowa, 57, 12 N. W. 775.

¹²¹ Little v. Phenix Bank, 7 Hill (N. Y.) 359; State v. Carpening, 32 N. C. (10 Ired. Law) 58; Wolfe v. Tyler, 48 Tenn. (1 Heisk.) 313. So of a note payable in "bank bills." Jones v. Fales, 4 Mass. 245; Childress v. Stuart, 7 Tenn. (Peck.) 276; Deberry v. Darnell, 13 Tenn. (5 Yerg.) 451, where an instrument payable in "North Carolina bank notes" was held negotiable.

¹²² Johnson v. Henderson, 76 N. C. 227; Lindsey v. McClelland, 18 Wis. 481, 506, 86 Am. Dec. 786; Wright v. Hart, 44 Pa. 454. Contra, see Bull v. Bank of Kasson, 123 U. S. 105, 31 Law. Ed. 97.

Parol evidence is admissible to show that the parties intended to pay in money. Haddock v. Woods, 46 Iowa, 433. An instrument payable in "current funds" may be shown by evidence of custom to be payable in money. American Immigrant Co. v. Clark, 47 Iowa, 671.

¹²³ Ruidskoff v. Barrett, 11 Iowa, 172. Contra, see Butler v. Paine, 8 Minn. (Gil. 284) 324.

¹²⁴ Hasbrook v. Palmer, 2 McLean, 10, Fed. Cas. No. 6,188, criticising Keith v. Jones, 9 Johns. (N. Y.) 120, and Judah v. Harris, 19 Johns. (N. Y.) 144.

current in the city of New York" has been held negotiable;¹²⁵ so, also, a note payable in "York State bills or specie."¹²⁶ Instruments payable in foreign money have been held negotiable,¹²⁷ but one payable in New York "in Canada money" has been held non-negotiable.¹²⁸

Instruments payable in services or merchandise — Instruments payable in alternative.

Instruments payable in services,¹²⁹ or in merchandise,¹³⁰ or in the alternative in money or merchandise,¹³¹ or in money or bank stock,¹³² are not negotiable.

Same—Warehouse receipts.

An exception to the rule that instruments payable in merchandise are not negotiable is found in the case of warehouse receipts which are negotiable in some states.¹³³

CERTAINTY AS TO TIME OF PAYMENT.

§ 42. The instrument must be payable:¹³⁴

- 1. On demand; or**
- 2. At a fixed or determinable future time.**

¹²⁵ Keith v. Jones, 9 Johns. (N. Y.) 120.

¹²⁶ Judah v. Harris, 19 Johns. (N. Y.) 144.

¹²⁷ See Singer v. Stimpson, 8 Mass. 260.

¹²⁸ Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546.

¹²⁹ Ransom v. Jones, 2 Ill. 291; Prather v. McEvoy, 8 Mo. 661; Quimby v. Meruitt, 30 Tenn. (11 Humph.) 439.

¹³⁰ Peddicord v. Whittam, 9 Iowa, 471; Gushee v. Eddy, 77 Mass. (11 Gray) 502, 71 Am. Dec. 728; Coyle's Ex'r v. Satterwhite's Adm'r, 20 Ky. (4 T. B. Mon.) 124; Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Brown v. Richardson, 20 N. Y. 472; Rhodes v. Lindly, 3 Ohio, 51.

¹³¹ Thompson v. Gaylord, 3 N. C. 326; Looney v. Pinckston, 1 Tenn. 383; Lawrence v. Dougherty, 13 Tenn. (5 Yerg.) 435.

¹³² Alexander v. Oaks, 19 N. C. (2 Dev. & B. Law) 513.

¹³³ See ante, § 34.

¹³⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or.,

INSTRUMENTS PAYABLE ON DEMAND.

§ 43. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation;
2. In which no time for payment is expressed.

§ 44. Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

Instruments payable on demand, at sight, or on presentation.

Instruments payable on demand, at sight, or on presentation, are payable on demand.¹³⁵ A note is payable on demand when made payable at the maker's "convenience,"¹³⁶ or "at any time called for,"¹³⁷ or "on demand, with interest after four months,"¹³⁸ or when made payable on the "first day of March," "without naming the year,"¹³⁹ or when made payable "on demand, with interest within six months from date."¹⁴⁰ The majority of the negotiable instruments laws place "demand" and "at sight" paper on the same basis, and in those states where days of grace have been

Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

¹³⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 7); Ariz. (§ 3310); Ill. (§ 7); Kan. (§ 14); Md. (§ 26); Mich. (§ 9); Neb. (§ 7); N. Y. (§ 26); Ohio (§ 3171 f); R. I. (§ 15); Wis. (§ 1675-7).

¹³⁶ *Colgate v. Buckingham*, 39 Barb. (N. Y.) 177, where the instrument was payable at "such time or times as the directors required." *Smithers v. Junker*, 41 Fed. 101, 7 L. R. A. 264; *Gaytes v. Hibbard*, 5 Biss. 99, Fed. Cas. No. 5,287.

¹³⁷ *Bowman v. McChesney*, 22 Grat. (Va.) 609.

¹³⁸ *Newman v. Kittelle*, 30 Mass. (13 Pick.) 418.

¹³⁹ *Collins v. Trotter*, 81 Mo. 275.

¹⁴⁰ *Jilson v. Hill*, 70 Mass. (4 Gray) 316. See, also, *Gove v. Downer*, 59 Vt. 139, 7 Atl. 463.

abolished there is no practical difference between instruments payable on demand and those payable at sight.¹⁴¹

Instruments not stating time of payment.

Instruments failing to state a time for payment are payable on demand. This is the rule of the law merchant¹⁴² and of the negotiable instruments laws.¹⁴³ Where no time of payment is given, parol evidence is admissible to show a contemporaneous oral agreement fixing the time.¹⁴⁴

Instruments issued, accepted, or indorsed when overdue.

Where an instrument is issued, accepted, or indorsed when overdue, it is as regards the person so issuing, accepting, or indorsing, payable on demand.¹⁴⁵ As to an indorsement after the paper is overdue, the rule here stated is the one in force in the federal¹⁴⁶ and in most of the state¹⁴⁷ courts. The indorsement after maturity is considered as the making of a new instrument

¹⁴¹ See post, § 186.

¹⁴² *Keyes v. Fenstermaker*, 24 Cal. 329; *Bacon v. Page*, 1 Conn. 404; *Green v. Drebilbis*, 1 G. Greene (Iowa) 552; *Porter v. Porter*, 51 Me. 376; *Herrick v. Bennet*, 8 Johns. (N. Y.) 374; *Ervin v. Brooks*, 111 N. C. 358, 16 S. E. 240; *Dodd v. Denny*, 6 Or. 156; *Messmore v. Morrison*, 172 Pa. 300; *Husbrook v. Wilder*, 1 Pin. (Wis.) 643.

¹⁴³ Subdivision 2, same sections of negotiable instruments laws as last above cited. *McLeod v. Hunter*, 29 Misc. 558, 61 N. Y. Supp. 73.

¹⁴⁴ *Horner v. Horner*, 145 Pa. 258, 23 Atl. 441; *Ross v. Espy*, 66 Pa. 481, 5 Am. Rep. 394.

¹⁴⁵ Same subdivision and sections of negotiable instruments laws as last above cited.

¹⁴⁶ *Cox's Adm'r v. Jones*, 2 Cranch, C. C. 370, Fed. Cas. No. 3,303; *Stewart v. French*, 2 Cranch, C. C. 300, Fed. Cas. No. 13,427.

¹⁴⁷ *Branch Bank at Montgomery v. Gaffney*, 9 Ala. 153; *Jones v. Robinson*, 11 Ark. 504, 54 Am. Dec. 212; *Levy v. Drew*, 14 Ark. 334; *Beer v. Clifton*, 98 Cal. 323, 32 Pac. 204, 35 Am. St. Rep. 172, 20 L. R. A. 327; *Bishop v. Dexter*, 2 Conn. 419; *Graul v. Strutzel*, 53 Iowa, 712, 6 N. W. 119, 36 Am. Rep. 250; *Goodwin v. Davenport*, 47 Me. 112, 74 Am. Dec. 478; *Colt v. Barnard*, 35 Mass. (18 Pick.) 260, 29 Am. Dec. 584; *Van Hoesen v. Van Alstyne*, 3 Wend. (N. Y.) 75, 79; *Leavitt v. Putnam*, 3 N. Y. Super. Ct. (1 Sandf.) 199; *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13

payable on demand.¹⁴⁸ But it has been held that, where an instrument has been transferred after dishonor, the original demand on the maker and notice to the indorser inure to the benefit of subsequent holders, and they need not make demand or give notice anew.¹⁴⁹

PAYABLE AT A FIXED OR DETERMINABLE FUTURE TIME.

- § 45. An instrument is payable at a determinable future time, which is expressed to be payable:
1. At a fixed period after date or sight; or
 2. On or before a fixed or determinable future time specified therein; or
 3. On or at a fixed period after the occurrence of a specified event, which is certain to happen though the time of happening be uncertain.
- § 46. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.
- § 47. But an instrument payable at a fixed period after date or sight is negotiable, though it be payable before then on a contingency.

Instruments payable at fixed period after date or sight.

An instrument is payable at a fixed or determinable future time which is expressed to be payable at a fixed period after date or sight.¹⁵⁰ Under the law merchant, an instrument payable "six

N. E. 75; *Smith v. Caro*, 9 Or. 278; *Tyler v. Young*, 30 Pa. 143; *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 724; *Corwith v. Morrison*, 1 Pin. (Wis.) 498.

¹⁴⁸ *Bishop v. Dexter*, 2 Conn. 419; *Coleman v. Dunlap*, 18 S. C. 591; *Moore v. Alexander*, 63 App. Div. 100, 71 N. Y. Supp. 420.

¹⁴⁹ *French v. Jarvis*, 29 Conn. 347.

¹⁵⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 4); Ariz. (§ 3307); Ill.

——— after date” is not so uncertain as to be void,¹⁵¹ nor is one payable “twenty-four after date,”¹⁵² and, under the negotiable instruments law, such instruments would be negotiable if there is anything on them from which the period of time intended can be ascertained. In accordance with this it has been held, under the act, that words “Due Oct. 1” at the end of a bill should be construed to mean payable October 1st, and the bill be deemed payable at a fixed time and negotiable.¹⁵³ A bill payable five days “after sight” is payable five days after acceptance, and not five days after presentment.¹⁵⁴

Provision for extension of time of payment.

There is a conflict among the authorities as to whether, under the negotiable instruments act, a provision whereby all parties waive notice of an extension of time for payment renders the note non-negotiable or not.¹⁵⁵ In the North Dakota case cited the note provided that “the makers and indorsers herein * * * consent that the time of payment may be extended without notice.” The note was, by its terms, payable on or before the first of October, 1903. The court says: “To us it is clear that it has the same effect as though the note read ‘on the 1st day of October, 1903, or thereafter on demand,’ in which case there

(§ 4); Kan. (§ 11); Md. (§ 23); Mich. (§ 6); Neb. (§ 4); N. Y. (§ 23); Ohio (§ 3171 c); R. I. (§ 12); Wis. (§ 1675-4).

¹⁵¹ *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539. See, also, *Weems v. Parker*, 60 Ill. App. 167, where it was held that “ninety — after date” means 90 days after date.

¹⁵² *Conner v. Routh*, 7 How. (Miss.) 176, 40 Am. Dec. 59.

¹⁵³ *Torpey v. Tebo*, 184 Mass. 307, 68 N. E. 223.

¹⁵⁴ *Mitchell v. Degrand*, 1 Mason, 176, Fed. Cas. No. 9,661.

¹⁵⁵ That it does. *Union Stock Yard Nat. Bank v. Bolan*, 14 Idaho, 87, 93 Pac. 508, 125 Am. St. Rep. 146.

That it does not. Note being payable on or before a day named. *First Nat. Bank v. Buttery* (N. D.) 116 N. W. 341. The note containing an unqualified agreement on the part of the maker to pay on a certain date, its negotiability is not destroyed by a provision providing that sureties consent to an extension of the time of payment without notice. *Farmer, Thompson & Helsell v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170 (not under negotiable instruments law).

would be no question of its negotiability. * * * This provision seems to us to have been inserted to protect the holder against any release of indorsers or others, by an extension without their assent, and the word 'makers' is evidently included to prevent any misunderstanding or misconstruction of the contract or failure to distinguish between makers, indorsers, sureties, and any other parties who might be or become liable thereon under certain contingencies as makers. This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due. In this respect it must be distinguished from a provision to the effect that the time of payment shall be extended indefinitely, in which case the uncertainty of the time renders the instrument non-negotiable."¹⁵⁶

Instruments payable "on or before" a fixed or determinable future time specified therein.

Paper payable "on or before" a fixed date is payable on such date, and is negotiable under both the law merchant¹⁵⁷ and the negotiable instruments laws.¹⁵⁸ The same rule applies to paper payable "on or by the first of March,"¹⁵⁹ or simply "by a certain date."¹⁶⁰

Instruments payable on or at a fixed period after event certain.

Instruments payable on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time

¹⁵⁶ First Nat. Bank v. Buttery (N. D.) 116 N. W. 341. For case dealing with "indefinite extension," see Woodbury v. Roberts, 59 Iowa, 348, 13 N. W. 312, 44 Am. Rep. 685.

¹⁵⁷ Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197; First Nat. Bank of Springfield v. Skeen, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748; Jordan v. Tate, 19 Ohio St. 586.

¹⁵⁸ Subdivision 2, same sections of negotiable instruments laws as last above cited. See Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363.

¹⁵⁹ See Massie v. Belford, 68 Ill. 290.

¹⁶⁰ Preston v. Dunham, 52 Ala. 217.

of happening be uncertain, are sufficiently certain as to time.¹⁶¹ The death of the maker of the note being certain to take place, a note promising to pay a certain sum, "to be allowed at my decease,"¹⁶² is negotiable, and so is one payable "60 days after my death;"¹⁶³ also one payable "on demand after my decease."¹⁶⁴ But instruments payable when the person shall become of age,¹⁶⁵ or be elected to a certain office,¹⁶⁶ or when a certain estate shall be settled up,¹⁶⁷ are not negotiable.

Instruments payable on contingency.

Instruments payable on a contingency are not certain, and hence are not negotiable, and the happening of the contingency does not cure the defect.¹⁶⁸ Instruments of this kind are illustrated by the last three illustrations used in the preceding section, and the happening of the contingency in any of those cases, i. e., the becoming of age, or the election to the office, or the settling up of the estate, would not cure the defect, or render the instrument negotiable from that time.¹⁶⁹

Instruments payable at fixed period after date or sight, though payable before then on a contingency.

It has been a recognized rule that instruments payable at a fixed period after date or sight, though payable before then on

¹⁶¹ Subdivision 3, same sections of negotiable instruments laws as last above cited.

¹⁶² *Martin v. Stone*, 67 N. H. 367, 29 Atl. 845.

¹⁶³ *Crider v. Shelby*, 95 Fed. 212.

¹⁶⁴ *Bristol v. Warner*, 19 Conn. 7. See, also, *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845; *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487.

¹⁶⁵ *Kelley v. Hemmingway*, 13 Ill. 604, 56 Am. Dec. 474, distinguishing *Goss v. Nelson*, 1 Burrows, 227.

¹⁶⁶ *Cooper v. Brewster*, 1 Minn. (Gil. 73) 94.

¹⁶⁷ *Husband v. Epling*, 81 Ill. 172, 25 Am. Rep. 273.

¹⁶⁸ Same subdivisions and sections of negotiable instruments laws as last above cited.

¹⁶⁹ *Kelley v. Hemmingway*, 13 Ill. 604, 56 Am. Dec. 474. See, also, *Chicago Railway Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 34 Law. Ed. 349.

a contingency, are sufficiently certain to be negotiable. Thus, one payable on a fixed day, "or when he completes" a certain building, is negotiable.¹⁷⁰ Also an instrument payable at a fixed time after date, "or before, if realized out of the sale" of certain property.¹⁷¹ The Wisconsin negotiable instruments law specially provides for instruments of this class and makes them negotiable.¹⁷² No express provision for them is made in the negotiable instruments law as adopted in the other states.

NECESSITY OF WORDS OF NEGOTIABILITY.

§ 48. An instrument to be negotiable must be payable to "order" or "bearer" or contain words of like import.

§ 49. Qualification.—The indicia of negotiability may be added by indorsement so as to render the instrument negotiable from that time.

It is a fixed rule of the law merchant that an instrument, to be negotiable, must be payable to order or to bearer, or contain words of like import,¹⁷³ and the negotiable instruments laws have adopted the rule.¹⁷⁴ Under this rule it is clear that an instrument

¹⁷⁰ *Stevens v. Blunt*, 7 Mass. 240. See, also, *Goodloe v. Taylor*, 10 N. C. (3 Hawks) 458.

¹⁷¹ *Walker v. Woollen*, 64 Ind. 164; *Noll v. Smith*, 64 Ind. 511, 31 Am. Rep. 131; *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808. But see *Stultz v. Silva*, 119 Mass. 137, where an instrument promising to pay a certain sum in a year and a half, "or sooner, at the option of the mortgagor," was held to be non-negotiable.

¹⁷² Negotiable Inst. Law, § 1675-4, subd. 4. Mortgage note for a specified sum and payable on a certain future date is negotiable, though it provides that on default in interest or failure to comply with any of the conditions of the mortgage then the entire principal should, at the option of the mortgagee, become due and payable. *Thorp v. Windeman*, 123 Wis. 149, 101 N. W. 417, 107 Am. St. Rep. 1053.

¹⁷³ *Backus v. Danforth*, 10 Conn. 297; *Yingling v. Kohlhass*, 18 Md. 148; *Maule v. Crawford*, 14 Hun (N. Y.) 193; *Albright v. Griffan*, 78 Ind. 182; *Carruth v. Walker*, 8 Wis. 103.

¹⁷⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or.,

payable to a named payee "only" is not negotiable,¹⁷⁵ nor is one payable to named payees "or their collector."¹⁷⁶ A bill of exchange not containing the words "order or bearer," though not negotiable, is valid.¹⁷⁷

Negotiable words may be supplied by indorsement.

Where an instrument is non-negotiable for lack of the words "order" or "bearer," an indorsement supplying the words makes the instrument negotiable from that time.¹⁷⁸

WHAT INSTRUMENTS PAYABLE TO ORDER.

§ 50. The instrument is payable to order when it is drawn payable to the order of a specified person or to him or his order. It may be drawn to the order of:

- 1. A payee who is not maker, drawer or drawee; or**
- 2. The drawer or maker;**

But a note drawn to the maker's own order is not negotiable until indorsed by him;

Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§§ 1, 184); Ariz. (§§ 3304, 3487); Ill. (§§ 1, 183); Kan. (§§ 8, 191); Md. (§§ 20, 203); Mich. (§§ 3, 186); Neb. (§§ 1, 173); N. Y. (§§ 20, 320); Ohio (§§ 3171, 3177 u); R. I. (§§ 9, 192); Wis. (§§ 1675-1, 1684).

Gilley v. Harrell, 118 Tenn. 115, 101 S. W. 424; Westberg v. Chicago Lumber & Coal Co., 117 Wis. 589, 94 N. W. 572. This changes the rule in Colorado (see Rev. St. c. 1084, and Thackaray v. Hanson, 1 Colo. 365), and in North Carolina (see Code, § 41). In North Carolina the section reads "Must be payable to a specified person or bearer." The words "specified person" would seem to add nothing to the section because included in Negotiable Inst. Act, § 1. See post, § 50.

Bonds payable to bearer held negotiable instruments. Parsons v. Utica Cement Mfg. Co., 80 Conn. 58, 66 Atl. 1024.

¹⁷⁵ Hackney v. Jones, 22 Tenn. (3 Humph.) 612. See, also, Backus v. Danforth, 10 Conn. 297.

¹⁷⁶ Noxon v. Smith, 127 Mass. 485.

¹⁷⁷ Mehlberg v. Tisher, 24 Wis. 607.

¹⁷⁸ Carruth v. Walker, 8 Wis. 103; Brenzer v. Wightman, 7 Watts & S. (Pa.) 264; Bay v. Freazer, 1 Bay (S. C.) 66.

3. **The drawee; or**
4. **Two or more payees jointly; or**
5. **One or some of several payees; or**
6. **The holder of an office for the time being.**

Instruments payable to the order of payee who is not maker or drawer.

An instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order.¹⁷⁹ It may be drawn payable to the order of a payee who is not the maker or drawer or drawee.¹⁸⁰

Instruments payable to the order of maker or drawer.

The negotiable instruments laws provide that an instrument payable to the order of the drawer or maker is payable to order.¹⁸¹ This rule, when taken with the rule that a note payable to the order of the maker is not complete until indorsed by him,¹⁸² changes the law, for heretofore instruments payable to the order of

¹⁷⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 8); Ariz. (§ 3311); Ill. (§ 8); Kan. (§ 15); Md. (§ 27); Mich. (§ 10); Neb. (§ 8); N. Y. (§ 27); Ohio (§ 3171 g); R. I. (§ 16); Wis. (§ 1675-8).

¹⁸⁰ Subdivision 1, same sections of negotiable instruments laws as last above cited.

¹⁸¹ Subdivision 2, same sections of negotiable instruments laws as last above cited.

¹⁸² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 184); Ariz. (§ 3487); Ill. (§ 183); Kan. (§ 191); Md. (§ 203); Mich. (§ 186); Neb. (§ 183); N. Y. (§ 320); Ohio (§ 3177 v); R. I. (§ 192); Wis. (§ 1684).

A note payable to the order of the maker is not valid until after negotiation. *Roach v. Sanborn Land Co.*, 135 Wis. 354, 115 N. W. 1102; *Murphy v. Schoch*, 135 Ill. App. 550; *Sherman v. Goodwin* (Ariz.) 89 Pac. 517.

the maker were payable to bearer¹⁸³ and passed by delivery.¹⁸⁴ Under the negotiable instruments act, delivery by the payee, as well as indorsement by him, is essential to the valid existence of such instrument.¹⁸⁵

Instruments payable to the order of drawee.

Instruments payable to the order of the drawee are now expressly made payable "to order" and are negotiable.¹⁸⁶

Instruments payable to the order of two or more payees jointly.

Instruments payable to the order of two or more payees jointly are payable to order,¹⁸⁷ provided the payees are all named or otherwise indicated with reasonable certainty.¹⁸⁸

¹⁸³ *Irving Nat. Bank v. Alley*, 79 N. Y. 536; *Bank of Winona v. Wofford*, 71 Miss. 711, 14 So. 262; *Main v. Hilton*, 54 Cal. 110. As against the maker, such instruments are by statutes in the following states made equivalent to instruments payable to bearer: Cal. (Civ. Code, §§ 8101, 8102); Minn. (Gen. St. 1894, § 2236).

Statutes of like import in the following states are repealed by the Negotiable Instruments Laws: Idaho (Rev. St. § 3446); Mich. (How. Am. St. § 1580); Mo. (Rev. St. § 735); Or. (Ann. Laws, §§ 3188, 3191); Nev. (Gen. St. § 4885); N. Y. (Rev. St. pt. 2, c. 4, tit. 2, § 5); N. D. (Rev. Code, §§ 4864, 4865); Wis. (Sanb. & B. Ann. St. § 1579); Wyo. (Laws 1888, c. 70, art. 2, § 13).

In some states the rule as to the necessity of the maker's indorsement on an instrument payable to his order is the same as that established by the negotiable instruments laws. *Lea v. Branch Bank at Mobile*, 8 Port. (Ala.) 119; *Lapeyre v. Weeks*, 28 La. Ann. 664; *Heywood v. Wingate*, 14 N. H. 73.

¹⁸⁴ *Bank of Lassen County v. Sherrer*, 108 Cal. 513, 41 Pac. 415; *O'Connor v. Clarke* (Cal.) 44 Pac. 482; *Irving Nat. Bank v. Alley*, 79 N. Y. 536; *Jones v. Shapera*, 6 C. C. A. 423, 57 Fed. 457; *Thompson v. Perrine*, 106 U. S. 589, 27 Law. Ed. 298.

¹⁸⁵ *Stouffer v. Curtis*, 198 Mass. 560, 85 N. E. 180; *Sherman v. Goodwin* (Ariz.) 89 Pac. 517.

¹⁸⁶ Cited in note 179, ante.

¹⁸⁷ Subdivision 4, same sections of negotiable instruments laws as last above cited. An instrument payable to "steamboat J and owners" has been held negotiable. *Moore v. Anderson*, 8 Ind. 18. See, also, *Wood v. Wood*, 16 N. J. Law, 428.

¹⁸⁸ A note payable to a named payee "et al." is not negotiable. *Gordon*

Instruments payable to the order of one or some of several payees.

Instruments payable to the order of one or some of several payees have heretofore been considered non-negotiable, e. g., a note payable to "A. or B.,"¹⁸⁹ or one payable to named payees "or their collector;"¹⁹⁰ but now, under the negotiable instruments laws, such instruments are seemingly made negotiable.¹⁹¹

Instruments payable to the order of the holder of an office.

An instrument payable to the order of the holder of an office for the time being is now payable "to order" and is negotiable.¹⁹² An instrument expressly payable to a trustee has hitherto been deemed non-negotiable. Thus it has been held that a note payable to a trustee or his order, and afterwards sold by him to a bank, was not "commercial paper," and that, as between the bank and the cestui que trust, the former was charged with notice that the transfer was in fraud of the trust.¹⁹³ In New York, however, an instrument payable to the trustees of a corporation, "or their successors in office, or order," is negotiable.¹⁹⁴ Notes payable to sheriffs, which show that they were given for the price of property sold at a judicial sale, carry on their face notice that such

v. Anderson, 83 Iowa, 224, 49 N. W. 86, 32 Am. St. Rep. 302, 12 L. R. A. 483.

¹⁸⁹ Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360; Musselman v. Oakes, 19 Ill. 81, 68 Am. Dec. 583.

¹⁹⁰ Noxon v. Smith, 127 Mass. 485.

¹⁹¹ Subdivision 5, same sections of negotiable instruments laws as last above cited. See ante, § 8, and post, § 54, which deal with the provision which provides that a bill of exchange may be addressed to "two or more drawees jointly * * * but not to two or more drawees in the alternative or in succession."

¹⁹² Subdivision 6, same sections of negotiable instruments laws as last above cited.

¹⁹³ Third Nat. Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304. See, also, McMasters v. Dunbar, 2 La. Ann. 577, in which it was held, following Nicholson v. Chapman, 1 La. Ann. 223, that a note payable on its face to the order of a tutor of minors carries notice that the obligation belongs to the minors.

¹⁹⁴ Davis v. Garr, 2 Seld. (N. Y.) 124.

officers took in their official capacity,¹⁹⁵ but the mere word "Sheriff" or the designation "Shff." does not show that the money was payable to the sheriff in such capacity.¹⁹⁶ The rule as here stated accords with that of the law merchant. In England, however, the rule has been changed so that "a bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."¹⁹⁷

WHAT INSTRUMENTS PAYABLE TO BEARER.

§ 51. The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. Where it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

Instruments expressly payable to bearer.

It seems axiomatic to state that instruments expressly made payable to bearer, or to a person named therein, "or bearer," are payable to bearer, yet the negotiable instruments laws, to be explicit, enumerate instruments so payable as bearer paper.¹⁹⁸

¹⁹⁵ *Ranney v. Brooks*, 20 Mo. 105; *Renshaw v. Wills*, 38 Mo. 201.

¹⁹⁶ *Powell v. Morrison*, 35 Mo. 244; *Fletcher v. Schaumburg*, 41 Mo. 50.

¹⁹⁷ Bills of Exchange Act.

¹⁹⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 9); Ariz. (§ 3312); Ill. (§ 9); Kan. (§ 16); Md. (§ 28); Mich. (§ 11); Neb. (§ 9); N. Y. (§ 28); Ohio (§ 3171 h); R. I. (§ 17); Wis. (§ 1675-9).

Instruments payable to fictitious or nonexistent persons.

Bills or notes made payable to the order of a fictitious or nonexistent person, if such fact was known to the person making it so payable, are payable to bearer.¹⁹⁹ Notes payable to fictitious persons have generally been treated as payable to bearer,²⁰⁰ and the negotiable instruments laws, by using the word "instrument," include bills of exchange. Hitherto a bill payable to the order of a fictitious person could not be treated as payable to bearer unless the fact that the payee was fictitious was known to the acceptor as well as to the drawer.²⁰¹ The doctrine that a check or bill made payable to a fictitious person is payable to bearer, and negotiable without indorsement, if the fictitious character of the payee was known to the parties, originated in England; and in each of the cases holding the doctrine the decision was based on the fact that the acceptor knew, at the time of his acceptance, that the instrument was payable to a fictitious person.²⁰² At common law the rule was uniformly based upon the law of estoppel and applied only against the parties who at the time they became liable on the bill or note were cognizant of the fictitious character of the supposed payee.²⁰³ And this is practically the rule adopted by the negotiable instruments law of this

A note payable to a certain person, or "holder," etc., is payable to bearer. *Putnam v. Crymes*, 1 McMul. (S. C.) 9, 36 Am. Dec. 250. Certificates of deposit payable on return of certificate properly indorsed. *Kavanagh v. Bank of America*, 239 Ill. 404, 88 N. E. 171.

¹⁹⁹ Subdivision 3, same sections of negotiable instruments laws as last above cited.

²⁰⁰ Same subdivisions and sections of negotiable instruments laws as last above cited.

Lane v. Kreckle, 22 Iowa, 399; *Anderson v. Dundee State Bank*, 20 N. Y. Supp. 511; *Forbes v. Espy*, 21 Ohio St. 474. And see *Farnsworth v. Drake*, 11 Ind. 101.

²⁰¹ *Hunter v. Blodgett*, 2 Yeates (Pa.) 480. But see 1 Daniel, *Negotiable Inst.*, p. 118.

²⁰² *Tatlock v. Harris*, 3 Term. R. 174, 180; *Vere v. Lewis*, 3 Term. R. 182; *Minet v. Gibson*, 3 Term. R. 481; *Gibson v. Minet*, 1 H. Bl. 569; *Gibson v. Hunter*, 2 H. Bl. 187.

²⁰³ *Vaglionia Bros. v. Bank of England*, 23 Q. B. Div. 260.

country.²⁰⁴ If the drawer or maker of an instrument does not know that the payee is a fictitious or nonexistent person, and does not intend to make the paper payable to such person, paper payable to the order of such person cannot be treated as payable to bearer, for the intention of the maker or drawer is the test,²⁰⁵

²⁰⁴ *Shipman v. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 22 N. E. 866, 15 Am. St. Rep. 655, 6 L. R. A. 625; *Boles v. Harding*, 201 Mass. 103, 87 N. E. 481; *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 15 Det. Leg. N. 376, 116 N. W. 617, 126 Am. St. Rep. 467, 17 L. R. A. (N. S.) 514; *Chism v. First Nat. Bank*, 96 Tenn. 641, 36 S. W. 387, 54 Am. St. Rep. 863, 32 L. R. A. 778; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, afg. 51 Misc. 103, 100 N. Y. Supp. 740, and 118 App. Div. 907, 103 N. Y. Supp. 1141; *Phillip v. Mercantile Nat. Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876.

²⁰⁵ *Shipman v. Bank of the State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; *Boles v. Harding*, 201 Mass. 103, 87 N. E. 481; *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 116 N. W. 617, 126 Am. St. Rep. 467, 17 L. R. A. (N. S.) 514; *Chism v. First Nat. Bank*, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, afg. 51 Misc. 103, 100 N. Y. Supp. 740, and 118 App. Div. 907, 103 N. Y. Supp. 1141. Applying the test of intention of the maker, it has also been held that the paper was not payable to bearer where a member of a firm signed a large number of checks, relying on the false statements of an employe, the names of the payees being in some instances fictitious and in others the names of existing persons having no relation to the paper. *Shipman v. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821. Thus, where plaintiff was induced by fraud to purchase a note by the pretended agent of a fictitious person, and gave to such agent therefor a check payable to such fictitious person, and the agent indorsed the check with the name of the fictitious payee and his own name, and it was paid to him by the bank on which it was drawn, it was held that plaintiff, having been ignorant of the fictitious character of the payee, and not having been negligent, could recover the amount of the check from the bank. *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 15 Am. St. Rep. 655.

and this intention must necessarily arise from knowledge and exist as an affirmative fact in the mind of the maker at the time of delivery of the paper.²⁰⁶

The English bills of exchange act provides that "where the payee is a fictitious or nonexisting person, the bill may be treated as payable to bearer."²⁰⁷ This provision is not to be regarded as controlled by the state of the law at the time of its enactment,²⁰⁸ and not being a codification of such law is deemed, by its provisions, to have swept away estoppel, and with it the controlling importance of knowledge and intention, as an element in determining whether a payee is fictitious.²⁰⁹

The term "fictitious," as construed by the courts, does not necessarily mean that the name of the payee represents a nonexisting person, but rather that it represents a person whom the maker knows has no interest in the paper, or, in other words, is

²⁰⁶ Drawer of draft. *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, afg. 51 Misc. 103, 100 N. Y. Supp. 740, and 118 App. Div. 987, 103 N. Y. Supp. 1141.

²⁰⁷ Bills of Exchange Act 1882, 45 and 46 Vict. c. 61, § 7, subd. 3.

²⁰⁸ *Bank of England v. Vagliano Bros.* [1891] App. Cas. 107, rvg. 23 Q. B. Div. 243.

²⁰⁹ In England, since the Bills of Exchange Act of 1882 (St. 45 & 46 Vict. c. 61, § 7, subd. 3), proof of knowledge by the maker who issues the instrument that the payee is fictitious or nonexistent is not required. A lawful holder may treat the instrument as payable to bearer, whenever it appears that the name of the payee is inserted merely as a pretense, without any intention that payment should be made in conformity with the promise, whether the name be that of an existing or a non-existing person. *Bank of England v. Vagliano Bros.* [1891] App. Cas. 107, 153; *Clutton v. Attenborough* [1897] App. Cas. 90. Plaintiffs' clerk induced them by fraud to draw checks in favor of a nonexistent person for pretended services by such person, and thereafter forged the indorsement of such person and negotiated the checks to defendant, a bona fide holder, to whom they were paid by plaintiff. It was held that the payee was a "fictitious and nonexisting" person, within the meaning of the above subdivision, though plaintiffs supposed, at the time the checks were drawn, that he was a real person, and that, the paper being payable to bearer, plaintiffs could not recover against defendant in an action for money paid under a mistake of fact. *Clutton v. Attenborough* [1895] 2 Q. B. Div. 306, *afid. Id.* 707.

fictitious so far as the paper is concerned.²¹⁰ Thus, where a clerk of a firm of bankers forged a large number of bills of exchange purporting to be drawn on the firm of bankers by one of its foreign correspondents, and payable to another well known firm, and the bankers accepted them, they were held within the statute and payable to bearer.²¹¹ Also the same rule was applied where one forged an administrator's name to checks payable to beneficiaries and calling for amounts larger than the latter were entitled to.²¹²

The rule adopted by the American negotiable instruments act might appear inconsistent with the provisions which declare the making or drawing of an instrument to constitute an admission of the existence of the payee and his then capacity to indorse, were it not that this admission apparently goes merely to the existence and capacity of the payee and does not dispense with proof of actual indorsement.

Instruments in which payee is not a "person."

When the name of the payee does not purport to be the name of any person, as in case of instruments drawn payable to an "estate,"²¹³ or to "expenses," or to "bills payable,"²¹⁴ or to "cash," the paper is payable to bearer.²¹⁵

²¹⁰ *Bank of England v. Vagliano Bros.* [1891] App. Cas. 107, rvg. 23 Q. B. Div. 243, 22 Q. B. Div. 103; *Shipman v. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Trust Co. of America v. Hamilton Bank*, 127 App. Div. 515, 112 N. Y. Supp. 84; *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876.

²¹¹ *Bank of England v. Vagliano Bros.* [1891] App. Cas. 107, rvg. 23 Q. B. Div. 243, 22 Q. B. Div. 103.

²¹² *Trust Co. of America v. Hamilton Bank*, 127 App. Div. 515, 112 N. Y. Supp. 84.

²¹³ *Scott v. Parker*, 5 N. Y. Supp. 753; *Lewinsohn v. Kent*, 33 N. Y. Supp. 826.

²¹⁴ *Willeys v. Phoenix Bank*, 9 N. Y. Super. Ct. (2 Duer) 121.

²¹⁵ Subdivision 4, same sections of negotiable instruments laws as last above cited.

Instruments indorsed in blank.

Another class of instruments payable to bearer is composed of instruments indorsed in blank. This is true in case the only indorsement is in blank, and also in case only the last indorsement is in blank.²¹⁶ If the maker of a note wrongfully obtains possession of it after its indorsement in blank by the payee, he becomes the bearer within the meaning of the act.²¹⁷

CERTAINTY AS TO PARTIES.

§ 52. Where instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

Where the instrument is payable to order, the payee must be named or otherwise indicated with reasonable certainty.²¹⁸ This requirement is not new.²¹⁹ The designation is sufficient if the

²¹⁶ Subdivision 5, same sections of negotiable instruments laws as last above cited. Notes indorsed in blank are payable to bearer. *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959; *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. 873. A note payable to the order of the maker becomes payable to bearer on indorsement in blank by the maker and may be transferred by delivery. *Roach v. Sanborn Land Co.*, 135 Wis. 354, 115 N. W. 1102.

See, also, *Curtis v. Sprague*, 51 Cal. 239; *Morris v. Preston*, 93 Ill. 215; *McDonald v. Bailey*, 14 Me. 101; *Mitchell v. Hyde*, 12 How. Pr. (N. Y.) 460; *Greneaux v. Wheeler*, 6 Tex. 515; *French v. Barney*, 23 N. C. (1 Ired. Law) 219.

²¹⁷ *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959.

²¹⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 8); Ariz. (§ 3311); Ill. (§ 8); Kan. (§ 15); Md. (§ 27); Mich. (§ 10); Neb. (§ 8); N. Y. (§ 27); Ohio (§ 3171 g); R. I. (§ 16); Wis. (§ 1675-8).

An instrument purporting to be a check which is payable "to the order of, on sight," no payee being named, and no space being left for a name, is not a check. *McIntosh v. Lytle*, 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410.

²¹⁹ *Tittle v. Thomas*, 30 Miss. 122, 64 Am. Dec. 154; *Moody v. Threlkeld*, 13 Ga. 55; *Evertson v. Nat. Bank of Newport*, 66 N. Y. 14, 23 Am. Rep. 9.

payee, though not named, can be readily ascertained from the instrument.²²⁰ Where a note is made payable to the order of the person who shall thereafter indorse it,²²¹ the designation is sufficient, and so is one payable to "the heirs" of a certain person,²²² but one payable to the "estate" of a deceased person does not sufficiently designate the payee,²²³ nor does one payable to named payees "et al." ²²⁴ An instrument in the form, "Good for one hundred and twenty-six dollars on demand," is not negotiable because no payee is named, but "is nothing more than a memorandum between the parties to it, to operate as a promise to pay money, as a receipt for money, or as proof of a sum of money to be accounted for, according to the evidence offered, to show the intention of both parties when it is made." ²²⁵

Same—Place for payee's name blank.

The rule that the payee must be named or indicated with reasonable certainty would seem to do away with the doctrine that, where the place for the payee's name is blank, the instrument is payable to bearer and is negotiable,²²⁶ especially since this kind of paper is not enumerated with the instruments made payable to bearer.²²⁷ Under the English Bills of Exchange Act 1882 (45 & 46 Vict. c. 61, § 7), providing that, where a bill is not pay-

²²⁰ *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1068, 17 Am. St. Rep. 377, 7 L. R. A. 489.

²²¹ *United States v. White*, 2 Hill (N. Y.) 59, 37 Am. Dec. 374. See, also, *Rich v. Starbuck*, 51 Ind. 87.

²²² *Cox v. Belthoover*, 11 Mo. 142, 47 Am. Dec. 145. See, also, *Bacon v. Fitch*, 1 Root (Conn.) 181.

²²³ *Lyon v. Marshall*, 11 Barb. (N. Y.) 241; *Wayman v. Torreyson*, 4 Nev. 124, holding that the payee must be in esse at the time the instrument takes effect.

²²⁴ *Gordon v. Anderson*, 83 Iowa, 224, 49 N. W. 86, 32 Am. St. Rep. 302, 12 L. R. A. 483.

²²⁵ *Brown v. Gilman*, 13 Mass. 158.

²²⁶ *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534; *Prewitt v. Chapman*, 6 Ala. 86.

²²⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 9); Ariz. (§ 3312); Ill.

able to bearer, "the payee must be named, or otherwise indicated therein with reasonable certainty," when construed with the provision defining a bill (section 3) as it is defined in the negotiable instruments laws, and the provision that a bill may be drawn payable to, or to the order of, the drawer (section 5), an instrument payable to "_____ order," there being no "or" before "order," means payable to "my order" that is, to the order of the drawer, and, after indorsement by the drawer, is a valid bill of exchange, though the blank is never filled.²²⁸

Same—Parol evidence of mistake.

If there was a mistake in the name of the payee, or the instrument is ambiguous in that particular, parol evidence is admissible to show the true intent of the parties.²²⁹ This rule applies both where the mistake is in the spelling²³⁰ and where the instrument is made out in the name of one not intended as payee.²³¹

§ 53. Where the instrument is addressed to a drawee, he must be named or otherwise indicated with reasonable certainty.

Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.²³² This rule is declaratory of the law merchant.²³³ Where a bill does

(§ 9); Kan. (§ 16); Md. (§ 28); Mich. (§ 11); Neb. (§ 9); N. Y. (§ 28); Ohio (§ 31711); R. I. (§ 17); Wis. (§ 1675-9).

²²⁸ Chamberlain v. Young [1893] 2 Q. B. Div. 206.

²²⁹ Medway Cotton Manufactory v. Adams, 10 Mass. 360; Leaphardt v. Sloan, 5 Blackf. (Ind.) 278.

²³⁰ Williams v. Baker, 67 Ill. 238; Jacobs v. Benson, 39 Me. 132, 63 Am. Dec. 609.

²³¹ Hall v. Tufts, 35 Mass. (18 Pick.) 455. See, also, New York African Soc. v. Varick, 13 Johns. (N. Y.) 38.

²³² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

²³³ See Watrous v. Halbrook, 39 Tex. 572; Prewitt v. Chapman, 6 Ala. 86.

not name any drawee, it has been held that it will be considered as drawn by the drawer on himself.²³⁴

§ 54. A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession.

A bill of exchange "may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession."²³⁵ This provision of the negotiable instruments laws seems to render a bill addressed to two or more drawees in the alternative or in succession not only non-negotiable but invalid. By another provision, instruments payable to the order of "one or some of several payees" are payable to order and are negotiable.²³⁶ How the courts will harmonize these apparently inconsistent provisions remains to be seen.

CERTAINTY AS TO PLACE OF PAYMENT.

§ 55. It is not necessary to the validity of a negotiable instrument that it should state the place where it is payable.

²³⁴ Funk v. Babbitt, 156 Ill. 408, 41 N. E. 166.

²³⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 128); Ariz. (§ 3431); Ill. (§ 127); Kan. (§ 135); Md. (§ 147); Mich. (§ 130); Neb. (§ 127); N. Y. (§ 212); Ohio (§ 3175 s); R. I. (§ 136); Wis. (§ 1680 b).

The words "or in succession" are not in the Wisconsin Negotiable Instruments Law.

The word "or" before "determinable" was omitted in the law as first adopted in New York, but the omission was supplied by amendment. Laws 1898, c. 336, § 25.

²³⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 8); Ariz. (§ 3311); Ill. (§ 8); Kan. (§ 15); Md. (§ 27); Mich. (§ 10); Neb. (§ 8); N. Y. (§ 27); Ohio (§ 3171 a); R. I. (§ 16); Wis. (§ 1675-8).

See, also, post, § 50, and notes.

- § 56. Where no place of payment is specified and no address is given, the instrument is payable at the usual or last known place of business or residence of the person to make payment or at any place he can be found.

Certainty as to place of payment.

It is not necessary to the validity or negotiability of an instrument that it should state the place where it is payable.²³⁷ This alters the rule in those states where an instrument is not negotiable unless it is payable at a bank or a banking house.²³⁸

Place not stated—Instrument payable at residence or place of business.

Where a place of payment is named, the instrument is payable there;²³⁹ but if no place of payment is named, the instrument is payable at the usual place of business or the residence of the per-

²³⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 6); Ariz. (§ 3309); Ill. (§ 6); Kan. (§ 13); Md. (§ 25); Mich. (§ 8); Neb. (§ 6); N. Y. (§ 25); Ohio (§ 3171 e); R. I. (§ 14); Wis. (§ 1675-6).

See, also, *Bank of America v. Woodworth*, 18 Johns. (N. Y.) 315; *Bank of Newberry v. Richards*, 35 Vt. 381.

²³⁸ Alabama (Code, §§ 1765, 2594); Indiana (Horner's Rev. St. 1881, § 5506); Kentucky (St. § 483); West Virginia (Code, c. 99, § 7).

The Virginia statute (Code, § 2849, Code, 1873, c. 141, § 7) was repealed by the negotiable instruments law. Where the statutory requirement is that the instrument be made payable at a particular bank within the state, it is not negotiable if made payable at a bank in another state. See *Bank of Marietta v. Pindall*, 2 Rand. (Va.) 465. See preceding note as to repeal of statute on which this decision was based. Nor if made payable at "either of the banking houses" in a certain city in the state. *Freeman's Bank v. Ruckman*, 16 Grat. (Va.) 126. See, also, *Smith v. Robinson*, 11 Ala. 270.

²³⁹ For construction of various instruments, where the place of payment given was ambiguous, see *Miller v. Powers*, 16 Ind. 410; *Lane v. Union Nat. Bank*, 3 Ind. App. 299, 29 N. E. 613; *Hazard v. Spencer*, 17 R. I. 561, 23 Atl. 729.

son who is to make payment, or at any place where such person can be found.²⁴⁰

ADDITIONAL PROVISIONS NOT AFFECTING NEGOTIABILITY.

§ 57. The negotiable character of an instrument otherwise is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity;
But conditional sale notes are usually deemed non-negotiable;
2. Authorizes a confession of judgment if the instrument be not paid at maturity;
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money;
But an instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.

§ 58. But nothing herein validates any provision or stipulation otherwise illegal.

Provision for sale of collateral securities.

The negotiable character of an instrument otherwise negotiable is not affected by a provision which authorizes the sale of collateral securities if the instrument be not paid at maturity.²⁴¹ So,

²⁴⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 73); Ariz. (§ 3376); Ill. (§ 73); Kan. (§ 80); Md. (§ 92); Mich. (§ 75); Neb. (§ 73); N. Y. (§ 133); Ohio (§ 3173 r); R. I. (§ 81); Wis. (§ 1678-3).

Place of presentment where no place is stated, see post, § 192.

²⁴¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or.,

a recital that the maker has deposited certain certificates as collateral does not destroy negotiability,²⁴² nor a recital that, on non-payment, the holder may sell the collateral and apply the proceeds to "payment and necessary charges."²⁴³ But a contract in an instrument for the payment of money, that the payee may sell certain warehouse receipts given as collateral, and, if they depreciate in value, may sell them before the instrument would otherwise become due, in which case the proceeds, less expenses, shall be applied in payment or part payment of the debt, and that any deficiency shall become due forthwith, renders the instrument non-negotiable, the court saying: "We find that such alternative contract introduces two elements of uncertainty in the instruments, to-wit, in the sum payable in case any sum become due before the time first specified in the instrument, and in the time when the same shall so become due."²⁴⁴ Under the corresponding provision of the English Bills of Exchange Act 1882 (45 & 46 Vict. c. 61, § 83, subd. 3), that a note "is not invalid by reason only that it contains also a pledge of collateral security, with authority to sell or dispose thereof," it has been held that a note containing more than is there referred to is not a promissory note, and that hence a note providing for payment of a sum certain in instalments, default in payment of any one instalment to mature the whole, and

Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 5); Ariz. (§ 3308); Ill. (§ 5); Kan. (§ 12); Md. (§ 24); Mich. (§ 7); Neb. (§ 5); N. Y. (§ 24); Ohio (§ 3171 d); R. I. (§ 13); Wis. (§ 1675-5).

See, also, *Arnold v. Rock River Val. R. Co.*, 14 N. Y. Super. Ct. (5 Duer) 207; *National Bank v. Gary*, 18 S. C. 282; *Perry v. Bigelow*, 128 Mass. 129, 25 Am. Rep. 40; *Bank of Carroll v. Taylor*, 67 Iowa, 572, 25 N. W. 810; *Gravert v. Goothard*, 81 Neb. 99, 115 N. W. 559.

²⁴² *Towne v. Rice*, 122 Mass. 67.

²⁴³ *Valley Nat. Bank of Chambersburg v. Crowell*, 148 Pa. 284, 23 Atl. 1068, 33 Am. St. Rep. 824.

Notes which are themselves given as collateral security are not negotiable. *American Nat. Bank v. Sprague*, 14 R. I. 410; *Haskell v. Lambert*, 82 Mass. 592; *Costelo v. Crowell*, 127 Mass. 293, 34 Am. Rep. 367.

²⁴⁴ *Continental Nat. Bank v. Wells*, 73 Wis. 332, 41 N. W. 409, citing *Morgan v. Edwards*, 53 Wis. 599, 11 N. W. 21, 40 Am. Rep. 781; *First Nat. Bank v. Larsen*, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365; *Cushman v. Haynes*, 37 Mass. (20 Pick.) 132.

containing the clause, "No time given to, or security taken from, or composition or arrangements entered into, with either party hereto, shall prejudice the rights of the holder to proceed against any other party," is not a promissory note, and cannot be declared on as such by an indorsee.²⁴⁵

Conditional sale notes—Not negotiable.

A provision in a note, otherwise negotiable, that the title to the property for which it was given shall remain in the vendor until the note is paid, has generally been held not to destroy negotiability;²⁴⁶ but the rule is otherwise in some of the states.²⁴⁷ In New York it has already been decided that such a note is not negotiable under the negotiable instruments laws.²⁴⁸ The reason for treating a conditional sale note as non-negotiable is stated by Cornell, J., in *Third Nat. Bank v. Armstrong* as follows: "If, prior to any default on the part of the defendant (maker), the company (payee) had retaken possession of the property, and disposed of it, so that, upon the maturity of the defendant's obligation, an observance of the condition on its part had become impossible, there can be no doubt that, under such circumstances, no action could have been maintained on his promise."²⁴⁹

Judgment notes—Negotiable.

A provision in a note authorizing a confession of judgment thereon if it is not paid at maturity, or a warrant or power of

²⁴⁵ *Kirkwood v. Smith* [1895] 1 Q. B. Div. 582.

²⁴⁶ *Chicago R. Equip. Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 Law. Ed. 349; *First Nat. Bank of Montgomery v. Slaughter*, 98 Ala. 602, 14 So. 545, 39 Am. St. Rep. 88; *Mott v. Havana Nat. Bank*, 22 Hun (N. Y.) 354; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100; *Choate v. Stevens*, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277, changing rule in Michigan. See *Wright v. Traver*, 73 Mich. 493, 41 N. W. 517, 3 L. R. A. 50.

²⁴⁷ *South Bend Iron Works v. Paddock*, 37 Kan. 510; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Stevens v. Johnson*, 28 Minn. 172, 9 N. W. 677.

²⁴⁸ *Third Nat. Bank of Buffalo v. Spring*, 28 Misc. 9, 59 N. Y. Supp. 794.

²⁴⁹ *Third Nat. Bank v. Armstrong*, 25 Minn. 530.

attorney to confess judgment attached to the note, makes the instrument what is commonly called a "judgment note," but does not affect its negotiability.²⁵⁰ It seems, however, that the warrant of attorney must authorize a confession of judgment in favor of the "holder" or the "legal holder," or the instrument will not be negotiable.²⁵¹ The provision should be definite, and neither a note payable in ninety days, containing a power of attorney to confess judgment "at any time hereafter,"²⁵² nor one containing a power of attorney to enter judgment on it at any time after its date, whether due or not,²⁵³ are negotiable. An illegal provision for a confession of judgment does not render a note non-negotiable.²⁵⁴

Instruments waiving statutory rights—Negotiable.

The negotiability of an instrument otherwise negotiable is not destroyed by a provision which waives the benefit of any law intended for the advantage or protection of the obligor.²⁵⁵ This provision of the negotiable instruments laws relates to instruments which contain a waiver of the benefit of appraisement, stay, exemption, or homestead laws. The theory upon which the negotiability of instruments of this nature rests is that such provisions do not in any way clog negotiation, but rather expe-

²⁵⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 5); Ariz. (§ 3308); Ill. (§ 5); Kan. (§ 12); Md. (§ 24); Mich. (§ 7); Neb. (§ 5); N. Y. (§ 24); Ohio (§ 3171 d); R. I. (§ 13); Wis. (§ 1675-5).

See, also, *Kemp v. Klaus*, 8 Neb. 24; *Osborn v. Hawley*, 19 Ohio, 130. Contra, see *Sweeney v. Thuckstun*, 77 Pa. 131.

²⁵¹ *Réam v. Merchants' Nat. Bank*, 2 Ohio Cir. Ct. R. 43.

²⁵² *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68.

²⁵³ Time of payment depends upon the whim or caprice of the holder and is absolutely uncertain. *Wisconsin Yearly Meeting of Freewill Baptists v. Bahle*, 115 Wis. 289, 91 N. W. 678.

²⁵⁴ *Tolman v. Janson*, 106 Iowa, 455, 76 N. W. 732.

²⁵⁵ Subdivision 3, same sections of negotiable instruments laws as last above cited.

See, also, *Schlesinger v. Arline*, 31 Fed. 648; *Hughitt v. Johnson*, 28 Fed. 865; *Lyon v. Martin*, 31 Kan. 411.

dite it by giving additional value to the instruments.²⁵⁶ A waiver of statutory requirements as to notice of protest and diligence in bringing suit also falls within this section.²⁵⁷ But nothing herein is to be deemed as validating any provision or stipulation otherwise illegal. In Wisconsin the effect of this section is specifically limited by providing that nothing therein shall authorize a waiver of exemptions from execution;²⁵⁸ and in North Carolina the negotiable instruments law provides that nothing in the law shall authorize the enforcement of a stipulation waiving exemptions, though the mention of such a stipulation in an instrument shall not affect its negotiability.²⁵⁹

Instruments giving holder election to require something to be done in lieu of payment in money.

A provision of this nature does not destroy negotiability.²⁶⁰ The point is illustrated by cases in which the holder was authorized to take corporate stock²⁶¹ or merchandise²⁶² in lieu of money.

Instruments with a provision of this kind must be distinguished carefully from the instruments heretofore considered, wherein the option is in favor of the maker, allowing him to pay in the alternative.

²⁵⁶ *Zimmerman v. Anderson*, 67 Pa. 421, 5 Am. Rep. 447. But see *Overton v. Tyler*, 3 Pa. 346, 45 Am. Dec. 645.

²⁵⁷ See *Hegeler v. Comstock*, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393, where the provision was that the indorsers, signers, and guarantors severally waive presentment, protest, notice, and diligence in bringing suit, but where the note was held non-negotiable for uncertainty as to the amount payable, and for containing contracts other than for the payment of money in violation of Comp. Laws, § 4462.

²⁵⁸ Negotiable Inst. Law, § 1675-5, subd. 5.

²⁵⁹ Negotiable Inst. Law, § 197.

²⁶⁰ Subdivision 4, same sections of negotiable instruments laws as last above cited.

²⁶¹ *Hodges v. Shuler*, 22 N. Y. 114.

²⁶² *Hosstatter v. Wilson*, 36 Barb. (N. Y.) 307.

Instruments promising to do something in addition to payment of money.

An instrument which contains an order or promise to do any act in addition to payment of money is not negotiable.²⁶³ Thus, an instrument which, in addition to a promise to pay money for the hire of a slave, promised to furnish the slave with clothing, is not negotiable.²⁶⁴ But an order written under a note as follows: "Levi Mason, Esq.: Please pay the above note, and hold it against me in our settlement," is a good bill of exchange, as "the retaining of the note as a voucher is no more the performance of another act beside the payment of the money than the retaining the order itself for the same purpose."²⁶⁵

²⁶³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo, (§ 5); Ariz. (§ 3308); Ill. (§ 5); Kan. (§ 12); Md. (§ 24); Mich. (§ 7); Neb. (§ 5); N. Y. (§ 24); Ohio (§ 3171 d); R. I. (§ 13); Wis. (§ 1675-5).

Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185.

²⁶⁴ Havens v. Potts, 86 N. C. 31. See, also, Austin v. Burns, 16 Barb. (N. Y.) 643.

²⁶⁵ Leonard v. Mason, 1 Wend. (N. Y.) 522.

CHAPTER V.

CONSIDERATION.

- § 59. Presumption of Consideration.
- § 60. Sufficiency of Consideration.
- § 61. Antecedent or Pre-existing Debt.
- § 62. Lienholders.
- § 63. Want or Failure of Consideration.
- § 64. Inadequacy of Consideration.
- § 65. Accommodation Paper.
- § 66. Liability of Accommodation Party to Holder for Value.

PRESUMPTION OF CONSIDERATION.

- § 59. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.**

Consideration is presumed.

One of the most important differences between negotiable and non-negotiable instruments is that a consideration for the former is presumed,¹ while the consideration for the latter must be

¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 24); Ariz. (§ 3327); Ill. (§ 24); Kan. (§ 31); Md. (§ 43); Mich. (§ 26); Neb. (§ 24); N. Y. (§ 50); Ohio (§ 3171 w); R. I. (§ 32); Wis. (§ 1675-50).

Bank of Monticello v. Dooly, 113 Wis. 590, 89 N. W. 490; Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059; Dawson v. Wombles, 123 Mo. App. 340, 100 S. W. 547; Lassos v. McCarty, 47 Or. 474, 84 Pac. 76; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88; Gilpin v. Savage, 60 Misc. 605, 112 N. Y. Supp. 802; Munsey v. Dempsey, 60 Misc. 317, 113 N. Y. Supp. 271; Zimbleman v. Finnegan (Iowa) 118 N. W. 312. Bank can

proved.² Under this rule, every person whose signature appears on a negotiable instrument is presumed to have become a party thereto for value.³ There is a presumption not only that a negotiable instrument was based on a consideration, but that it was

presume that check deposited with it was issued for value. *Faile v. Crawford*, 34 App. Div. 278, 54 N. Y. Supp. 264. Burden of proving lack of consideration is on defendant. *Joveshof v. Rockey*, 58 Misc. 559, 109 N. Y. Supp. 818; *Culbertson v. Salinger* (Iowa) 117 N. W. 6. It has already been held in New York under these sections that a bank cannot presume that a check deposited with it was issued for value. *Riverside Bank v. Woodhaven Junction Land Co.*, 34 App. Div. 266, 54 N. Y. Supp. 266.

See, also, cases cited in note 4, *infra*.

On shifting of the burden of proof, see *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726.

Consideration for indorsement or transfer, see post, § 125.

Purchase for value, essential of purchase in due course, see post, § 167.

² *Bristol v. Warner*, 19 Conn. 7; *Courtney v. Doyle*, 92 Mass. (10 Allen) 122; *Averett's Adm'r v. Booker*, 15 Grat. (Va.) 163, 76 Am. Dec. 203.

The doctrine heretofore in force in New York as shown by the decisions in *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845; *Kimball v. Huntington*, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590, and *President, etc., of Goshen & M. Turnpike Road v. Hurtin*, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273, that a consideration for a non-negotiable instrument is presumed, is now nullified by the provisions of the negotiable instruments law.

In Colorado the rule as to consideration for a transfer of a non-negotiable instrument has not been changed by the negotiable instruments law, for it was already the rule in that state that a transferee of a non-negotiable note takes only the rights of the prior holder, and any defense good against such holder is good against him. *Mulligan v. Smith*, 13 Colo. App. 231, 57 Pac. 731.

Want of consideration may be shown in an action on a non-negotiable instrument, though the consideration is mentioned in the instrument itself as executed, for such admission is in the nature of a receipt and is only prima facie evidence of consideration. *Mulligan v. Smith*, 13 Colo. App. 231, 57 Pac. 731.

³ Same sections of negotiable instruments laws as last above cited.

Bank of Monticello v. Dooly, 113 Wis. 590, 89 N. W. 490; *Hickok v. Bunting*, 92 App. Div. 167, 86 N. Y. Supp. 1059; *Lynchburg Milling Co. v. National Exch. Bk.* (Va.) 64 S. E. 980.

See ante, note 1.

based on a sufficient consideration,⁴ and this presumption applies alike to instruments expressing "value received"⁵ and to those not expressing a consideration.⁶ It is also presumed that the consideration was legal,⁷ and a maker denying liability or defending on the ground of the illegality of the consideration has the burden of showing such illegality.⁸ The presumption of consideration is not conclusive and may be rebutted,⁹ but the rebutting evidence, to be effectual, must show an actual want of consideration.¹⁰

SUFFICIENCY OF CONSIDERATION.

§ 60. Value is any consideration sufficient to support a simple contract.

§ 61. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.

⁴ *Younglove v. Cunningham* (Cal.) 43 Pac. 755; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; *Bristol v. Warner*, 19 Conn. 7; *Lines v. Smith*, 4 Fla. 47; *Whitney v. Clary*, 145 Mass. 156, 13 N. E. 393; *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487; *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845; *Campbell v. McCormac*, 90 N. C. 491; *Wilson v. Wilson*, 26 Or. 315, 38 Pac. 189; *First Nat. Bank v. Foote*, 12 Utah, 157, 42 Pac. 205; *Du Pont v. Beck*, 81 Ind. 271; *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726; *Nichols & Shepard Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110; *Connery v. Macfarlane*, 97 Pa. 361.

⁵ *Gamewell v. Mosely*, 77 Mass. (11 Gray) 173; *Howell v. Wright*, 41 Hun (N. Y.) 167; *Stronach v. Bledsoe*, 85 N. C. 473.

⁶ See cases cited in note 4, *supra*.

Statement of consideration not necessary to negotiability, see ante, § 32.

⁷ *Cundiff v. Campbell*, 40 Tex. 142.

⁸ *Wyman v. Fiske*, 85 Mass. (3 Allen) 238, 80 Am. Dec. 66; *Brigham v. Potter*, 80 Mass. (14 Gray) 522; *Pixley v. Boynton*, 79 Ill. 351; *Hapgood v. Needham*, 59 Me. 442.

⁹ *Carrol v. Peters*, 1 McGloin (La.) 88.

¹⁰ *Black River Sav. Bank v. Edwards*, 76 Mass. (10 Gray) 387; *White v. Davis*, 62 Hun, 622, 17 N. Y. Supp. 548.

§ 62. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Sufficiency of consideration.

It is a general rule that any consideration which will support any other simple contract will sustain a negotiable instrument.¹¹ Thus, money or services,¹² scrip for corporate stock,¹³ agreeing to the change of collateral securities,¹⁴ a waiver of legal rights,¹⁵ or a forbearance to enforce such rights,¹⁶ constitutes a sufficient consideration for a negotiable instrument. So, also, the undertaking

¹¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 25); Ariz. (§ 3328); Ill. (§ 25); Kan. (§ 32); Md. (§ 44); Mich. (§ 27); Neb. (§ 25); N. Y. (§ 51); Ohio (§ 3171 x); R. I. (§ 33); Wis. (§ 1675-51).

Matlock v. Scheuerman (Or.) 93 Pac. 823.

Consideration for indorsement or transfer, see post, § 125.

Purchase for value, essential to character as holder in due course, see post, § 167.

¹² Miller v. McKenzie, 95 N. Y. 575, 47 Am. Rep. 85; Ould v. Myers, 23 Grat. (Va.) 383.

¹³ Scrip for shares of stock in an existing corporation form a sufficient consideration. Avon Springs Sanitarium Co. v. Kellogg, 125 App. Div. 51, 109 N. Y. Supp. 153. But subscription to stock before company is incorporated is not a valid consideration. Id.

¹⁴ Voss v. Chamberlain (Iowa) 117 N. W. 269.

¹⁵ Sykes v. Lafferry, 27 Ark. 407; Byington v. Simpson, 134 Mass. 145; Montgomery v. Morris, 32 Ga. 173. Release of indorser on a forged instrument constitutes "value." Jennings v. Law, 199 Mass. 124, 85 N. E. 157.

¹⁶ Hindert v. Schneider, 4 Ill. App. 203; Austell v. Rice, 5 Ga. 472; Robinson v. Gould, 65 Mass. (11 Cush.) 55; Mechanics' & Farmers' Bank v. Wixson, 42 N. Y. 438. Agreement to forbear suit on an existing indebtedness. Milius v. Kauffmann, 104 App. Div. 442, 93 N. Y. Supp. 669. Acceptance of note payable in the future, for goods sold and delivered, operates as a forbearance of the right to sue until the maturity of the note. J. H. Mohlman Co. v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046. One surrendering old note and accepting new note held a holder for value. Van Norden Trust Co. v. Rosenberg, 62 Misc. 285, 114 N. Y. Supp. 1025.

and obligation of a remote indorsee who takes the paper as collateral security to make presentment for payment and give notice of nonpayment constitutes a sufficient consideration for the transfer.¹⁷ The consideration, however, must not be affected with illegality,¹⁸ for, where part of the consideration for a note is illegal, the entire promise fails.¹⁹ While generally a consideration passing to one of several joint makers will sustain the instrument as against the others,²⁰ still the difference between a solvent and an insolvent signer of a note is a valuable consideration to another who signs, relying on the financial responsibility of those who join as makers.²¹

On the theory that mutual promises sustain each other, one promissory note is a sufficient consideration for another given for it,²² and a bill of exchange is a sufficient consideration for a note given in exchange,²³ and a check is a sufficient consideration for a bill.²⁴

Antecedent or pre-existing debt; lien holders.

Taking a negotiable instrument for an antecedent or pre-existing debt involves a forbearance on the part of the creditor, and such a debt constitutes value, both for instruments payable on

¹⁷ *In re Hopper-Morgan Co.*, 154 Fed. 249.

¹⁸ Where agent of seller receives commission of latter, a note executed by the buyer representing an additional bonus or commission on the sale is, unless expressly agreed to, without consideration and voidable. *Shelton Implement Co. v. Schieck*, 81 Neb. 826, 116 N. W. 951.

¹⁹ *First Nat. Bank of El Paso v. Miller*, 235 Ill. 135, 85 N. E. 312.

²⁰ *McAfee v. Glen Mary Coal & Coke Co.*, 97 Ala. 709, 11 So. 881; *Westphal v. Nevills*, 92 Cal. 545, 28 Pac. 678; *Isaack v. Porter*, 9 Ky. (2 A. K. Marsh.) 452; *Hoxie v. Hodges*, 1 Or. 251; *Rutland v. Brister*, 53 Miss. 683.

²¹ *City Deposit Bank v. Green*, 138 Iowa, 156, 115 N. W. 893.

²² *Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46, affg. 60 Hun, 583, 14 N. Y. Supp. 911; *Wilson v. Denton*, 82 Tex. 531, 27 Am. St. Rep. 908; *Higginson v. Gray*, 47 Mass. (6 Metc.) 212; *Dockray v. Dunn*, 37 Me. 442.

²³ *Newman v. Frost*, 52 N. Y. 422.

²⁴ *Mayer v. Heidelberg*, 4 N. Y. Supp. 529; *Matlock v. Scheuerman* (Or.) 93 Pac. 823.

demand and those payable at a future time.²⁵ The provision of the negotiable instruments laws that an antecedent or pre-existing debt constitutes value follows the rule in force in the federal courts,²⁶ and the rule previously in force in some of the states,²⁷ but changes the rule in others.²⁸ In deciding cases under this section, the courts have reached different conclusions as to the effect of the act upon existing law. Some of the New York courts hold that it makes no change in the law as it previously existed in that state, and that in order that an antecedent debt may constitute value, the antecedent debt must have been canceled and discharged on the acceptance of the instrument or the time of pay-

²⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 25); Ariz. (§ 3328); Ill. (§ 25); Kan. (§ 32); Md. (§ 44); Mich. (§ 27); Neb. (§ 25); N. Y. (§ 51); Ohio (§ 3171 x); R. I. (§ 33); Wis. (§ 1675-51).

²⁶*Voss v. Chamberlain* (Iowa) 117 N. W. 269; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426; *Milius v. Kauffmann*, 104 App. Div. 442, 93 N. Y. Supp. 669; *Mundlin v. Appelbaum*, 62 Misc. 300, 114 N. Y. Supp. 908; *Bigelow Co. v. Automatic Gas Producer Co.*, 56 Misc. 389, 107 N. Y. Supp. 894; *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522; *Hermann's Ex'r v. Gregory* (Ky.) 115 S. W. 809; *In re Hopper-Morgan Co.*, 154 Fed. 249; *J. H. Mohlman Co. v. McKane*, 60 App. Div. 546, 69 N. Y. Supp. 1046; *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1. Notes given for a pre-existing indebtedness on consideration that the maker, a commercial firm, be allowed to sell its stock to pay creditors, and that the payee furnish it new stock, held for a valuable consideration. *Richardson v. Wren* (Ariz.) 95 Pac. 124.

²⁶*Railroad Co. v. National Bank*, 102 U. S. 14, 26 Law. Ed. 61; *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 Law. Ed. 166.

²⁷*Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308; *Leach v. Lewis*, 8 D. C. (1 McArthur) 112; *Cecil Bank v. Heald*, 25 Md. 562; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620; *Wooley v. Cobb*, 165 Mass. 503, 43 N. E. 497; *Reddick v. Jones*, 28 N. C. (6 Ired. Law) 107, 44 Am. Dec. 68; *Dunham v. Peterson*, 5 N. D. 414, 57 Am. St. Rep. 556, 36 L. R. A. 232; *Red River Valley Nat. Bank v. North Star Boot & Shoe Co.*, 8 N. D. 432, 79 N. W. 880; *Knox v. Clifford*, 38 Wis. 651; *Wilkie v. Chandon*, 1 Wash. 355.

²⁸*Coddington v. Bay*, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342; *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142; *Benjamin v. Rogers*, 126 N. Y. 60, 26 N. E. 970; *King v. Doolittle*, 38 Tenn. (1 Head) 77; *Ferress v. Tavel*, 87 Tenn. 386, 11 S. W. 93, 3 L. R. A. 414.

ment extended.²⁹ That recovery on the instrument might extinguish the claim is not sufficient, there being nothing to show that in case of failure to recover the debt would still be extinguished.³⁰ The rule as here laid down is believed to be erroneous and to arise from a failure to consider those sections of the act which provide that "where a holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value, to the extent of his lien,"³¹ and, in some cases, that value is any consideration sufficient to support a simple contract.³² The true rule, under the negotiable instruments act, would seem to be that a person holding a note as collateral security for a pre-existing debt is a holder for value to the extent of the amount due him.³³ Of course this rule limits the amount of the recovery to the amount of the debt secured,³⁴ except where the instrument is in the hands of a bona fide holder,³⁵ in which

²⁹ *Harris v. Fowler*, 59 Misc. 523, 110 N. Y. Supp. 987; *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 504. Note to secure pre-existing debt not enforceable against accommodation indorser unless taken in payment of debt or time of payment thereof extended. *Roseman v. Mahony*, 86 App. Div. 377, 83 N. Y. Supp. 749. The holder of the note must give up the debt wholly or qualifiedly in order to constitute consideration. *Id.*

³⁰ *Harris v. Fowler*, 59 Misc. 523, 110 N. Y. Supp. 987; *Commercial Nat. Bank v. Citizens' State Bank*, 132 Iowa, 706, 109 N. W. 198.

³¹ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 27); Ariz. (§ 3330); Ill. (§ 27); Kan. (§ 34); Md. (§ 46); Mich. (§ 29); Neb. (§ 27); N. Y. (§ 53); Ohio (§ 3171 z); R. I. (§ 35); Wis. (§ 1675-53).

³² *In re Hopper-Morgan Co.*, 154 Fed. 249. See ante, § 60.

³³ *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822; *Graham v. Smith* (Mich.) 15 Det. Leg. N. 923, 118 N. W. 726; *Brewster v. Shrader*, 26 Misc. 480, 57 N. Y. Supp. 606. This view of the law changes the rule in all of these states.

³⁴ *Hatcher v. Independence Nat. Bank*, 79 Ga. 547, 5 S. E. 111; *Handy v. Sibley*, 46 Ohio St. 9, 17 N. E. 329; *Winship v. Merchants' Nat. Bank*, 42 Ark. 22.

The rule applies to accommodation paper. *Continental Nat. Bank v. Bell*, 125 N. Y. 38, 25 N. E. 1070; *Handy v. Sibley*, 46 Ohio St. 9, 17 N. E. 329.

³⁵ See *In re Hopper-Morgan Co.*, 154 Fed. 249. See, also, post, chapter XI.

case there would seem to be a liability to account for the surplus to the debtor.³⁶

EFFECT OF WANT OR FAILURE OF CONSIDERATION.

§ 63. Absence or failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

§ 64. In the absence of fraud, mere inadequacy of consideration is no defense.

Effect of want or failure of consideration.

Under the negotiable instruments act, as well as under the law merchant, want³⁷ or failure³⁸ may be shown as between the original parties or against one not a bona fide holder.³⁹ Under the

³⁶ Camden Nat. Bank v. Fries-Breslin Co., 214 Pa. 395, 63 Atl. 1022.

³⁷ Litchfield Bank v. Peck, 29 Conn. 384; Radcliffe v. Biles, 94 Ga. 480, 20 S. E. 359; Beall v. Pearre, 12 Md. 550; Hill v. Buckminster, 22 Mass. (5 Pick.) 391; Slade v. Halstead, 7 Cow. (N. Y.) 322; Southerland v. Whitaker, 50 N. C. (5 Jones Law) 5; Knowles v. Knowles, 128 Ill. 110, 21 N. E. 196.

³⁸ Hawks v. Truesdell, 94 Mass. (12 Allen) 564; Bookstaver v. Jayne, 60 N. Y. 146; Washburn v. Picot, 14 N. C. (3 Dev.) 390, 24 Am. Dec. 266.

³⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 28); Ariz. (§ 3331); Ill. (§ 28); Kan. (§ 35); Md. (§ 47); Mich. (§ 30); Neb. (§ 28); N. Y. (§ 54); Ohio (§ 3172); R. I. (§ 36); Wis. (§ 1675-54).

Battemen v. Butcher, 95 App. Div. 213, 88 N. Y. Supp. 685; Weiss v. Rieser, 62 Misc. 292, 114 N. Y. Supp. 983; City Deposit Bank v. Green, 138 Iowa, 156, 115 N. W. 893; St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 Atl. 145. The act makes no change in the rule that parol evidence is admissible to show want of consideration and the like. People's Nat. Bank v. Schepflin, 73 N. J. Law, 29, 62 Atl. 333. In a suit between maker and payee on a purchase-money note, the maker may defeat or limit the amount of recovery thereon by proving, in the one case,

law merchant, a partial failure may be shown as a defense pro tanto, if it is of a definite or liquidated amount of the whole consideration.⁴⁰ The negotiable instruments laws, by providing that the absence or failure of consideration is matter of defense as against any person not a holder in due course, and that a partial failure of consideration is a defense pro tanto, "whether the failure is an ascertained and liquidated amount or otherwise,"⁴¹ have advanced somewhat beyond the rule of the law merchant. In this connection it must be remembered that, since a person who obtains possession of an instrument improperly or irregularly, for example, one who obtains possession of an instrument payable on demand which has been negotiated an unreasonable time after its issuance, is not a holder in due course,⁴² the defense of want or

a total unexcused nonperformance on the part of the vendor of his contract to deliver the property, or loss, on the part of the vendee, of the benefit of the contract, occasioned by want of title in the vendor, and, in the other, refusal of the vendee to accept the property, and notice of his intention not to do so, given before the title passed; all on the theory of failure of consideration in whole or in part. *Acme Food Co. v. Older* (W. Va.) 61 S. E. 235.

A promissory note given to a near relative by a person in declining years, by way of compensation or reward for services rendered and to be rendered, is so much in the nature of a testamentary disposition of the property that ordinarily the maker's estimate of the value of the services will not be disturbed on the ground of disparity between the actual value thereof and the amount of the note. *Badé v. Feay*, 63 W. Va. 166, 61 S. E. 348. That such a note so given calls for a larger sum than the services were probably worth does not invalidate it on the ground of fraud or failure of consideration. *Id.*

⁴⁰ *Pulsifer v. Hotchkiss*, 12 Conn. 234; *Allen v. Bank of U. S.*, 20 N. J. Law, 620; *Payne v. Cutler*, 13 Wend. (N. Y.) 605. In some cases it has been held that a partial unliquidated failure of consideration may be shown as between the original parties, in mitigation of damages. *Davis v. Wait*, 12 Or. 425, 8 Pac. 356; *Christy v. Ogle*, 33 Ill. 295. And see *Beall v. Pearre*, 12 Md. 550.

⁴¹ Same sections negotiable instruments law as last above cited.

This affirms the rule existing in Oregon. *Davis v. Wait*, 12 Or. 425. See, also, *Edwards v. Porter*, 42 Tenn. (2 Cold.) 42. It changes the rule in North Carolina. See *Evans v. Williamson*, 79 N. C. 86; *Washburn v. Picot*, 3 Dev. (N. C.) 390.

⁴² *Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La.,*

failure of consideration is good as against him. A note wholly without consideration is not evidence of any indebtedness between the original parties,⁴³ but equity will not grant relief on the ground of a want of consideration, unless there is danger that the instrument may be held outstanding until evidence of want of consideration cannot be produced in an action at law.⁴⁴ The right to set up the defense of want or failure of consideration may be lost by acts or omissions amounting in law to a waiver or to an estoppel.⁴⁵

Inadequacy of consideration.

Mere inadequacy of consideration, without fraud, is no defense,⁴⁶ unless the inadequacy is so great as to be itself a badge of fraud.⁴⁷

ACCOMMODATION PAPER.

- § 65. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.
- § 66. An accommodation party is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 53); Ariz. (§ 3356); Ill. (§ 53); Kan. (§ 60); Md. (§ 72); Mich. (§ 55); Neb. (§ 53); N. Y. (§ 92); Ohio (§ 3172y); R. I. (§ 61); Wis. (§ 1676-23).

⁴³ Hildeburn v. Curran, 65 Pa. 59.

⁴⁴ Metler's Adm'rs v. Metler, 18 N. J. Eq. 270.

⁴⁵ McCreary v. Parsons, 31 Kan. 447; Howard v. Palmer, 64 Me. 86; Edison General Elec. Co. v. Blount, 96 Ga. 272, 23 S. E. 306; Morrill v. Prescott, 64 N. H. 505, 15 Atl. 123; Horton v. Arnold, 18 Wis. 223. See, also, Longmire v. Fain, 89 Tenn. 393, 18 S. W. 70.

⁴⁶ Lewis v. Woodfolk, 61 Tenn. (2 Baxt.) 25; Boggs v. Wann, 58 Fed. 681.

⁴⁷ Jones v. Degge, 84 Va. 685, 5 S. E. 799.

Accommodation paper.

An accommodation bill or note within the law merchant is one made, accepted, or indorsed without consideration, to enable the payee or holder to obtain money or credit on the strength of the name of the maker, acceptor, or indorser.⁴⁸ The negotiable instruments laws define accommodation paper in practically the same language,⁴⁹ and hence a consideration moving to accommodation maker is necessary to uphold his promise.⁵⁰ Whether a signature was placed on negotiable paper for the purpose of accommodation must be determined ordinarily from the circumstances of each particular case,⁵¹ and parol evidence is admissible to show both the accommodation character of the signature and

⁴⁸ Pollard v. Huff, 44 Neb. 892, 63 N. W. 58; Jefferson County v. Burlington & M. R. Co., 66 Iowa, 385, 16 N. W. 561, 23 N. W. 899, citing 1 Daniel, Negotiable Inst. § 189. Credit given maker of note is a sufficient consideration to bind accommodation indorser. Bank of Morgan City v. Herwig, 121 La. 513, 46 So. 611. Where notes were indorsed as an accommodation and accepted by the payee to secure a debt, the notes are not taken out of the category of ordinary commercial paper. *Id.*

⁴⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 29); Ariz. (§ 3332); Ill. (§ 29); Kan. (§ 36); Md. (§ 48); Mich. (§ 31); Neb. (§ 29); N. Y. (§ 55); Ohio (§ 3172 a); R. I. (§ 37); Wis. (§ 1675-55).

In the negotiable instruments law as first adopted in New York the headline to this section read, "Liability of accommodation indorser," but the word "indorser" was changed to "party" by amendment. Laws 1898, c. 336, § 22.

⁵⁰ Marling v. Jones, 138 Wis. 82, 119 N. W. 931.

⁵¹ The following recent cases decide whether certain paper was or was not accommodation paper: Messmore v. Meyer, 56 N. J. Law, 31, 27 Atl. 938; Capital City State Bank v. Des Moines Cotton-Mill Co., 84 Iowa, 561, 51 N. W. 33; Lockwood v. Twitchell, 146 Mass. 623, 16 N. E. 728; Adams v. Kennedy, 175 Pa. 160.

Indorsements in the following cases were held to be for accommodation: National Bank of Commerce v. Atkinson, 55 Fed. 465; Aetna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 167; Robertson v. Rowell, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466; Fox v. Rural Home Co., 90 Hun, 365, 25 N. Y. Supp. 896; Newbold v. Boraef, 155 Pa. 227, 26 Atl. 305.

the party accommodated,⁵² but the rule must be carefully applied so as not to defeat the purpose and effect of written instruments, and such parol contract must be established by clear, precise and indubitable evidence.⁵³ Irregular signatures may be presumed to be accommodation in character.⁵⁴ A note made to enable the payee to raise money on the credit of the signer's name will not be presumed to be accommodation paper, if the maker was indebted to the payee on open account, in an amount equal to the face of the note.⁵⁵ Nor does the making and delivering of one note in exchange for another constitute either of the instruments accommodation paper, though the exchange was mutually convenient to the parties.⁵⁶ The original payee of paper executed for his benefit and accommodation cannot recover thereon

⁵² Indorser. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, afg. 118 App. Div. 412, 103 N. Y. Supp. 584. This is not altered by the fact that § 114 does not expressly state that, if the indorser signed for the accommodation of the acceptor, he is liable to all parties subsequent to the acceptor. *Id.*

⁵³ *Lebanon Nat. Bank v. Long*, 220 Pa. 556, 69 Atl. 1033.

⁵⁴ Where a note is taken from the payee in payment of a debt due from him, indorsed by a third person, the indorsement is prima facie an accommodation indorsement, and the person who takes it is chargeable with knowledge that the indorsement is an accommodation indorsement. *Brill Co. v. Norton & Tanton St. R. Co.*, 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525. Where the maker presents for discount paper payable to his own order, and indorsed by another, the latter is presumed to be an accommodation indorser. *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466; *Erwin v. Shaffer*, 9 Ohio St. 43, 72 Am. Dec. 613; *Overton v. Hardin*, 46 Tenn. (6 Cold.) 375. See, also, further, on the question of presumption and burden of proof, *Clay City Nat. Bank v. Halsey*, 17 C. C. A. 222, 70 Fed. 567; *First Nat. Bank v. Alton*, 60 Conn. 402, 22 Atl. 1010; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455; *Murphy v. Gumaer*, 12 Colo. App. 951, 55 Pac. 951. Where the party primarily liable on a note or draft presents the same for discount with the name of the indorser or drawer thereon, the transaction on its face shows that the indorser or drawer is a mere accommodation party, and the party receiving such paper is chargeable with notice of its accommodation character. *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193.

⁵⁵ *Long v. Gieriet*, 57 Minn. 278, 59 N. W. 194.

against the accommodation maker,⁵⁷ for accommodation paper has no validity until it has been discounted or has passed into the hands of a holder for value.⁵⁸ Until such discounting or transfer takes place, the maker may withdraw from and rescind his engagement,⁵⁹ but an accommodation maker compelled to pay the note may sue the accommodated parties to recover the amount paid and interest,⁶⁰ though, it should be noted, such suit is not one based on the note.⁶¹

An accommodation party is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party,⁶² but this rule does not obtain when the accommodation party has no

⁵⁶ Farber v. National Forge & I. Co., 140 Ind. 54, 39 N. E. 249; Williams v. Banks, 11 Md. 198; Whittier v. Eager, 83 Mass. (1 Allen) 499; Rice v. Grange, 131 N. Y. 149, 30 N. E. 46.

See, also, *supra*, note 22.

⁵⁷ More v. Maddock, 33 Mo. 575; Coghlin v. May, 17 Cal. 515.

⁵⁸ Second Nat. Bank v. Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744; Tufts v. Shepherd, 49 Me. 312; Macy v. Kendall, 33 Mo. 164; Smith's Ex'rs v. Wyckoff, 3 Sandf. Ch. (N. Y.) 77.

⁵⁹ Second Nat. Bank v. Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744; Downes v. Richardson, 5 Barn. & Ald. 674; Whitworth v. Adams, 5 Rand. (Va.) 342; Berkeley v. Tinsley, 88 Va. 1001, 14 S. E. 842.

⁶⁰ Morgan v. Thompson, 72 N. J. Law, 244, 62 Atl. 410.

⁶¹ Morgan v. Thompson, 72 N. J. Law, 244, 62 Atl. 410.

⁶² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 29); Ariz. (§ 3332); Ill. (§ 29); Kan. (§ 36); Md. (§ 48); Mich. (§ 31); Neb. (§ 29); N. Y. (§ 55); Ohio (§ 3172 a); R. I. (§ 37); Wis. (§ 1675-55).

White v. Savage, 48 Or. 604, 87 Pac. 1040; Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Citizens' Nat. Bank v. Lilienthal, 40 App. Div. 609, 57 N. Y. Supp. 567; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666; Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1. The fact that an indorsee for value knew that the note was an accommodation note between the original parties is not a defense to an action by him on the note. Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88.

This accords with law merchant. Hodges v. Nash, 43 Ill. App. 638; Tourtelot v. Reed, 62 Minn. 384, 64 N. W. 928; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Holland Trust Co. v. Waddell, 75 Hun, 104, 26 N. Y. Supp. 980.

authority to enter into such an agreement,⁶³ and in the latter case the burden is on the holder to prove that he is a holder for value and without knowledge of the accommodation character of such party's signature.⁶⁴ It should be noted that the liability of the accommodation party, as here stated, is not limited to a "holder in due course," but is to a "holder for value,"⁶⁵ and this rule has been applied to accommodation paper shown to have been appropriated by the accommodated party to some purpose other than that for which it was given.⁶⁶

The act is not deemed to change pre-existing laws as to whom may become accommodation parties.⁶⁷ As a general rule corporations cannot become accommodation indorsers.⁶⁸

⁶³ Manufacturing corporation. *National Bank of Newport v. Snyder Mfg. Co.*, 117 App. Div. 370, 102 N. Y. Supp. 478; *Brill Co. v. Norton & Tanton St. R. Co.*, 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525.

⁶⁴ *National Bank of Newport v. Snyder Mfg. Co.*, 117 App. Div. 370, 102 N. Y. Supp. 478.

⁶⁵ *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109; *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931. Rule applied in favor of one taking demand note as collateral for pre-existing debt. *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1.

⁶⁶ *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109.

⁶⁷ The act does not change the statutory law of New Jersey rendering invalid a promissory note executed by a married woman for the accommodation of another. *People's National Bank v. Schepflin*, 73 N. J. Law, 29, 62 Atl. 333. Married woman may become bound as accommodation indorser of note, made by partnership of which husband was a member and business manager and payable to her husband. Case does not seem to be limited to particular facts. This accords with former rule in state. *Middleborough Nat. Bank v. Cole*, 191 Mass. 168, 77 N. E. 781.

⁶⁸ *Fox v. Rural Home Co.*, 90 Hun, 365, 35 N. Y. Supp. 896; *Aetna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75. Manufacturing corporation has no power to become accommodation indorser. *National Bank of Newport v. Snyder Mfg. Co.*, 117 App. Div. 370, 102 N. Y. Supp. 327. A corporation organized to make tubing or webbing has no power to issue accommodation paper. *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193.

CHAPTER VI.

CONSTRUCTION AND OPERATION.

- § 67. 1. Ambiguity as to Amount—Words Control Figures.
 - 2. Interest Clause.
 - 3. Undated Instruments.
 - 4. Conflict Between Written and Printed Portions.
 - 5. When Bill May be Treated as Promissory Note.
 - 6. Capacity in Which One Signs Uncertain.
 - 7. Joint and Several Liability.
 - 8. Memoranda on Instrument.
 - 9. Several Instruments.
- § 68. Bill of Exchange Not an Assignment.
- § 69. Exception:—Bill on Particular Fund.
- § 70. Check Not an Assignment.

IN GENERAL.

- § 67. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:
 - 1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;
 - 2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;
 - 3. Where the instrument is not dated, it will be considered to be dated, as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;
5. Where the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, or where the instrument is so ambiguous that there is doubt, whether it is a bill or note, the holder may treat it as either at his option.
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;
7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon;
8. Memoranda on the instrument if made at or before delivery and are material to the contract are part of the instrument;
9. Several instruments executed at or about the same time and as parts of the same transaction may be construed together.

Ambiguity as to amount—Words control figures.

The general rule for construction of contracts, that words control figures in case of a discrepancy, applies to negotiable instruments.¹ Thus, where marginal figures and the written words expressing the amount differ, evidence that the bill was negotiated

¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 17); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

See, also, *Poorman v. Mills*, 39 Cal. 345, 2 Am. Rep. 451; *National Bank of Rockville v. Second Nat. Bank*, 69 Ind. 479.

for the amount expressed in the figures is not admissible.² If, however, the words are ambiguous and the figures certain, reference may be had to the figures to fix the amount.³ Thus, where the place for the amount in the body of an instrument in the form of a note is blank, but the word "dollars" follows the blank, and the figures "\$147.70" appear in the margin, the figures "should be taken as the amount which the obligor intended to obligate himself to pay, and the obligation enforced accordingly."⁴

Interest clause.

If a negotiable instrument provides for interest, but fails to specify the date from which the interest shall run, interest runs from the date of the instrument, if it is dated, and, if it is not dated, from the time of its issuance.⁵ The latter part of the rule is a logical outcome of the rule that an undated instrument takes date from the time of its issuance.⁶ Where a note secured by mortgage is ambiguous as to the time from which interest is to

² *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652.

³ Subdivision 1, same sections of the negotiable instruments laws as last above cited.

So, too, where the words are illegible (*Riley v. Dickens*, 19 Ill. 29), or where there are no words expressing the amount (*Wittey v. Michigan Mut. Life Ins. Co.*, 123 Ind. 411, 24 N. E. 141, 18 Am. St. Rep. 327, 8 L. R. A. 365), or the words are misspelled (*Burnham v. Allen*, 67 Mass. [1 Gray] 496).

Option of holder to treat ambiguous instrument as bill or note, see post, subd. 5.

⁴ *Wittey v. Michigan Mut. Life Ins. Co.*, 123 Ind. 411, 24 N. E. 141, 18 Am. St. Rep. 327, 8 L. R. A. 365.

⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 117); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

This is declaratory of the law. See *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; *Cambell P. P. & M. Co. v. Jones*, 79 Ala. 475; *Smith v. Goodlett*, 92 Tenn. 230, 21 S. W. 106; *Miller v. Cavanaugh*, 99 Ky. 377, 35 S. W. 920, 59 Am. St. Rep. 463.

⁶ See ante, § 14.

run, the uncertainty is removed by definite terms in the mortgage.⁷ A note payable on demand draws interest from date.⁸ So, also, a note not expressing any time of payment.⁹ It is often the case that the word "interest" is not used, but the instrument will be construed to be interest-bearing if it is clear from an inspection of it that such was the intent of the parties. Thus, the words "at six per cent" mean interest at the rate of six per cent,¹⁰ and the words "at 10 per cent" indicate that the instrument is interest-bearing.¹¹ The word "use" is equivalent to "interest,"¹² and the expression "Int. @ 6% p. a." indicates that the instrument bears interest at the rate of six per cent per annum.¹³

Undated—Deemed dated as of date of issuance.

As has been shown a negotiable instrument need not be dated;¹⁴ not being dated it will be considered dated as of the time it was issued.¹⁵

Conflict between writing and printing—Writing controls.

Another general rule governing contracts, which applies to negotiable instruments, is that, in case of a conflict between the writ-

⁷ *Stanton v. Caffee*, 58 Wis. 261, 16 N. W. 601; *Prichard v. Miller*, 86 Ala. 500, 5 So. 784.

⁸ *Packer v. Roberts*, 40 Ill. App. 613; *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308. But see *Hunter v. Wood*, 54 Ala. 71.

⁹ *Collier v. Gray*, 1 Tenn. (1 Overt.) 110; *Husbrook v. Wilder*, 1 Pin. (Wis.) 643.

¹⁰ *Durant v. Murdock*, 3 App. D. C. 114.

¹¹ *Thompson v. Hoagland*, 65 Ill. 310.

¹² *Cisne v. Chidester*, 85 Ill. 523; *McClellan v. Morris*, Kirby (Conn.) 145.

¹³ *Belford v. Beatty*, 145 Ill. 414, 34 N. E. 254, afg. 46 Ill. App. 539.

¹⁴ See ante, chapter III, § 13.

¹⁵ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 17); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

See ante, chapter III, § 14.

ten and the printed portions of an instrument, the written provisions prevail.¹⁶

When bill may be treated as promissory note.

Where the drawer and the drawee is the same person, that is, where the drawer draws on himself, the holder may, at his option, treat the instrument as a bill or as a note.¹⁷ This rule is well illustrated where the instrument was in the form: "350.00, Bloomington, Ill., April 23, 1891. Thirty days after date, pay to the order of E. D. Babbitt three hundred and fifty dollars, for value received. Funk & Lackey;" and the court said: "The firm drew bills, but did not address them to any third person or persons, and it is therefore to be regarded that they were, in legal effect, addressed to themselves, as drawees, and the signature of the firm to the several bills bound the firm both as drawers and acceptors;" and that, "the drawers and drawees being the same, the bills are in legal effect promissory notes, and may be treated as such, or as bills, at the holder's option."¹⁸

He has this option also in case the drawee is a fictitious person, or one without capacity to contract,¹⁹ and in case the instrument

¹⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 17); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

¹⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 130); Ariz. (§ 3433); Ill. (§ 129); Kan. (§ 137); Md. (§ 149); Mich. (§ 132); Neb. (§ 129); N. Y. (§ 214); Ohio (§ 3175 v); R. I. (§ 138); Wis. (§ 1680-D).

This is also the rule of the law merchant. See *Wardens, etc., of St. James Church v. Moore*, 1 Ind. 289; *Hasey v. White Pidgeon Beet-Sugar Co.*, 1 Doug. (Mich.) 193; *McCandlish v. Cruger*, 2 Bay (S. C.) 377. See, also, *Commonwealth v. Butterick*, 100 Mass. 12; *Burnheisel v. Field*, 17 Ind. 609.

¹⁸ *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166.

¹⁹ Same sections of the negotiable instruments laws as last above cited. See, also, *Cork v. Bacon*, 45 Wis. 192, 30 Am. Rep. 712, where it was

is so ambiguous that there is doubt whether it is a bill or a note.²⁰

Capacity uncertain—Deemed an indorser.

Subject to the qualifications imposed by another section,²¹ where it is not clear in what capacity one signing an instrument intended to sign, he is deemed an indorser.²²

Parties—Joint and several liability.

Where two or more persons sign an instrument containing the words "I promise to pay," they are jointly and severally liable. This is the rule of the law merchant²³ and of the negotiable in-

held that erasing part of the name of a bank on a check and writing in the name of another bank did not make the latter a fictitious drawee.

²⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 17); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

For liability of drawer of instrument in form of note, but addressed to and accepted by, a third person, see *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166.

²¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 63); Ariz. (§ 3366); Ill. (§ 63); Kan. (§ 70); Md. (§ 82); Mich. (§ 65); Neb. (§ 63); N. Y. (§ 113); Ohio (§ 3173 h); R. I. (§ 71); Wis. (§ 1677-3).

²² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 17); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 Pac. 509; *Bank of Montpelier v. Montpelier Lumber Co.* (Idaho) 102 Pac. 685.

For full discussion of these sections and of cases, see post, chapter XI, § 154.

²³ *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Hemmenway v. Stone*, 7 Mass. 58, 5 Am. Dec. 27; *Partridge v. Colby*, 19 Barb. (N. Y.) 248; *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095; *Dill v. White*, 52 Wis. 456.

struments laws.²⁴ Such expressions as "I or we promise to pay,"²⁵ or "We or either of us promise to pay,"²⁶ also create a joint and several liability in case more than one sign. A note signed by two, and containing the words "We promise to pay," is the simplest illustration of an instrument creating merely a joint liability.²⁷

Memoranda made before delivery are part of contract.

Memoranda on the face or back of the instrument, whether signed or not, if made at the time of delivery and material to the contract, are part of the instrument, and parol evidence is admissible to show the circumstances under which they were made. This is a generally accepted rule of the law merchant,²⁸ and has been expressly incorporated into the negotiable instruments law in Wisconsin,²⁹ and impliedly into that of other states by the section providing that in any case not provided for in the act the rules of the law merchant shall govern.³⁰

Several instruments may be construed together.

The Wisconsin negotiable instruments law has expressly added another general rule of construction not expressly found in the

²⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 17); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

²⁵ Harris v. Coleman & A. White Lead Co., 58 Ill. App. 366.

²⁶ Pogue v. Clark, 25 Ill. 295. But see Harvey v. Irvine, 11 Iowa, 82.

²⁷ Barnett v. Juday, 38 Ind. 86.

²⁸ Van Zandt v. Hopkins, 151 Ill. 248, 37 N. E. 845; Specht v. Berndorf, 56 Neb. 553, 76 N. W. 1059, 42 L. R. A. 429; Seymour v. Farquhar, 93 Ala. 292, 8 So. 466; Franklin Sav. Inst. v. Reed, 125 Mass. 365; Barnard v. Cushing, 45 Mass. (4 Metc.) 230, 38 Am. Dec. 362; Blake v. Coleman, 22 Wis. 415, 99 Am. Dec. 53. But see Howry v. Eppinger, 34 Mich. 30.

²⁹ Section 1675-10.

³⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 196); Ariz. (§ 3491); Ill. (§ 195); Kan. (§ 7); Md. (§ 19); Mich. (§ 2); Neb. (§ 194); N. Y. (§ 7); Ohio (§ 3178 e); R. I. (§ 7); Wis. (§ 1675).

law as adopted in other states, though impliedly incorporated therein by the provision making the rules of the law merchant controlling in cases unprovided for.³¹ It is to the effect that where several writings are executed at or about the same time, as parts of the same transaction, intended to accomplish the same object, they may be construed together as one instrument as to all parties having notice thereof.³² Under this rule, as to one not a bona fide holder, a contemporaneous written agreement may be shown to be part of the contract.³³ A note and the mortgage securing it are to be construed together as one instrument.³⁴

EFFECT OF AN INSTRUMENT AS AN ASSIGNMENT.

§ 68. A bill of exchange of itself does not operate as an assignment of the funds in the hands of the drawer available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

³¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 196); Ariz. (§ 3491); Ill. (§ 195); Kan. (§ 7); Md. (§ 19); Mich. (§ 2); Neb. (§ 194); N. Y. (§ 7); Ohio (§ 3178 e); R. I. (§ 7); Wis. (§ 1675).

³² Wis., subd. 8, § 1675-17.

Parts of bill drawn in a set form one bill. See § 14.

³³ Wood v. Ridgeville College, 114 Ind. 320, 16 N. E. 619; Montgomery v. Hunt, 93 Ga. 438, 21 S. E. 59; Carrington v. Waff, 112 N. C. 115, 16 S. E. 1008; Traders' Nat. Bank v. Smith (Tex. Civ. App.) 22 S. W. 1056; Reed v. Cassatt, 153 Pa. 156, 25 Atl. 1074. But see Coffin v. Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076.

A contemporary written agreement between the maker and the payee, given as part of the consideration of the note, and modifying the time of payment, may be shown as between the maker and a holder with notice of the agreement; as, where the note was payable 13 months after date, and the written agreement was that it was not to be payable until the payee sold, or caused to be sold, certain goods for the maker. Jacobs v. Mitchell, 46 Ohio St. 601, 22 N. E. 768.

³⁴ Brownlee v. Arnold, 60 Mo. 79; Muzzy v. Knight, 8 Kan. 456.

§ 69. **Exception.**—A bill drawn on or payable out of a particular fund may operate as an equitable assignment in toto or pro tanto.

§ 70. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the same.

Negotiable bill does not operate as assignment—Bill or order on particular fund does so operate.

A negotiable bill of exchange does not of itself operate as an assignment of funds in the hands of the drawee, and the drawee is not liable thereon until he accepts it.³⁵ If, however, a bill is drawn on a particular fund,³⁶ it operates as an equitable assignment³⁷ in toto or pro tanto, as the case may be, and the same rule applies to an order payable out of a particular fund.³⁸ If

³⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 127); Ariz. (§ 3430); Ill. (§ 126); Kan. (§ 134); Md. (§ 146); Mich. (§ 129); Neb. (§ 126); N. Y. (§ 211); Ohio (§ 3175 r); R. I. (§ 135); Wis. (§ 1680 a).

Bosworth v. Jacksonville Nat. Bank, 64 Fed. 615; Meldrum v. Hender-son, 7 Colo. App. 256, 43 Pac. 148; Exchange Bank v. Sutton Bank, 78 Md. 577, 28 Atl. 563; Whitney v. Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316; Lynch v. First Nat. Bank, 107 N. Y. 179, 13 N. E. 775, 1 Am. St. Rep. 803; Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456. But see Howell v. Boyd Mfg. Co., 116 N. C. 806, 22 S. E. 5.

³⁶ Bills of this kind are not negotiable. See ante, §§ 36, 37.

³⁷ Kahnweiler v. Anderson, 78 N. C. 133; Robbins v. Bacon, 3 Me. 346; Ballou v. Boland, 14 Hun (N. Y.) 355. But see Grammel v. Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363.

³⁸ Lewis v. Berry, 64 Barb. (N. Y.) 593; Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517; Central Nat. Bank v. Spratlen, 7 Colo. App. 430, 43 Pac. 1048; Lee v. Robinson, 15 R. I. 369; Shenandoath Val. R. Co. v. Miller, 80 Va. 821.

Also where order was against specific account for work, labor and material. Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; City of Seattle v. Liberman, 9 Wash. 276; Chistmas v. Russell, 81 U. S. (14 Wall.) 69, 84, 20 Law. Ed. 762; McDaniel v. Maxwell, 21 Or. 202, 27 Pac. 952, 28 Am. St. Rep. 740.

the order does not designate the fund, an equitable assignment takes place if it is designated by a subsequent parol agreement.³⁹ Under this provision of the negotiable instruments law (that a draft does not operate as an assignment of the fund), when construed with a law providing that in an action against a savings bank by a depositor the bank must pay the fund into court if it is claimed by a third person,⁴⁰ and that a defendant against whom an action on contract or to recover a chattel is brought may have a person who demands the same thing substituted as defendant,⁴¹ a savings bank sued on a draft cannot pay the amount into court and have a claimant of the fund substituted as defendant, because the action is not by a depositor, within the meaning of the statute, nor is it on a contract with the bank, nor is it one to recover a chattel.⁴²

Check does not operate as assignment.

The same rule which applies to bills of exchange in general also applies to checks, and a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer in the bank, and the bank is not liable to the holder unless it accepts or certifies the check.⁴³ This rule of the negotiable instruments laws follows the weight of authority,⁴⁴ but changes the law

³⁹ *McDaniel v. Maxwell*, 21 Or. 202, 27 Pac. 952, 28 Am. St. Rep. 740.

Effect of acceptance of bill, see post, chapter VIII.

⁴⁰ Laws N. Y. 1892, c. 689, § 115.

⁴¹ Code N. Y. § 820.

⁴² *Master v. Bowery Sav. Bank*, 63 N. Y. Supp. 964.

⁴³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 189); Ariz. (§ 3487); Ill. (§ 188); Kan. (§ 196); Md. (§ 208); Mich. (§ 191); Neb. (§ 188); N. Y. (§ 325); Ohio (§ 3177 z); R. I. (§ 197); Wis. (§ 1684-5).

Van Buskirk v. State Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182; *Baltimore & Ohio R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837; *Libby Bros. Glass Co. v. Farmers' & Mechanics' Bank*, 220 Pa. 1, 69 Atl. 280; *Boswell v. Citizens' Sav. Bank*, 123 Ky. 485, 29 Ky. Law Rep. 988, 96 S. W. 717. Applies to check payable to order and transferred by delivery. *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83.

⁴⁴ *Georgia Seed Co. v. Talmadge & Co.*, 96 Ga. 254, 22 S. E. 1001; *Colorado Nat. Bank v. Boettcher*, 5 Colo. 185, 40 Am. Rep. 142; *Ex-*

in some of the states.⁴⁵ As between the drawer and the payee or his transferee, it has heretofore been generally held that a check operates as an equitable assignment,⁴⁶ and the above rule of the negotiable instruments laws undoubtedly means that, as against the bank, a check does not operate as an equitable assignment. Where, however, money has been deposited in a bank for the benefit of the person who afterwards becomes payee of a check thereon, and the bank has notice of his rights, the check operates as an equitable assignment to him.⁴⁷

change Bank v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Bank of Antigo v. Union Trust Co., 149 Ill. 343, 36 N. E. 948, 34 L. R. A. 611; Carr v. National Security Bank, 107 Mass. 45; First Nat. Bank v. Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580; Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921, 25 L. R. A. 523.

⁴⁵ See Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870; Bell v. Alexander, 21 Grat. (Va.) 1.

In several of the states the rule is different from that of the negotiable instruments laws. See Springfield Marine & Fire Ins. Co. v. Peck, 102 Ill. 265; Farmers' Bank & T. Co. v. Newland, 97 Ky. 464, 31 S. W. 38; Morrison v. McCartney, 30 Mo. 183.

⁴⁶ Deener v. Brown, 8 D. C. (1 MacArthur) 350; Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870; Pease v. Landauer, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247.

⁴⁷ Van Allen v. American Nat. Bank, 3 Lans. (N. Y.) 517; Hemphill v. Yefkes, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607.

CHAPTER VII.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

- § 71. When Necessary.
- § 72. When Excused.
- § 73. Must be Within Reasonable Time.
- § 74. Reasonable Hour; Business Day.
- § 75. Sunday or Holiday.
- § 76. Where Time is Insufficient.
- § 77. Place of Presentment.
- § 78. By Whom Made.
- § 79. To Whom Made—Drawee or His Agent.
- § 80. Bill Addressed to Two or More Drawees Not Partners.
- § 81. Drawee Dead.
- § 82. Bankruptcy or Insolvency of Drawee.
- § 83. Bills Drawn in Sets.
- § 84. Dishonor by Nonacceptance.
- § 85. Rights of Holder on Nonacceptance.
- § 86. Duties of Holder on Nonacceptance.
- § 87. Referee in Case of Need.

WHEN NECESSARY.

§ 71. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Necessity of presentment for acceptance.

Where a bill is payable after sight, it must be presented for acceptance in order to fix the time of maturity, and, in all cases

where the time of maturity can be fixed only by presentment, a presentment must be made.¹ Bills payable at sight fall within the operation of this rule,² but bills payable on demand or at a certain period after date do not fall within the rule, and it is not necessary to present them for acceptance.³ A check, being a bill payable on demand,⁴ need not be presented for acceptance⁵ unless it contains an express stipulation to that effect,⁶ but may, of course, be presented for certification, which is equivalent to acceptance.⁷ Presentment for acceptance is necessary in case the bill is payable elsewhere than at the residence or place of business of the drawee,⁸ and in case the bill itself expressly stipulates that it shall be presented for acceptance.⁹

¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 143); Ariz. (§ 3446); Ill. (§ 142); Kan. (§ 150); Md. (§ 162); Mich. (§ 145); Neb. (§ 142); N. Y. (§ 240); Ohio (§ 3176 g); R. I. (§ 151); Wis. (§ 1681).

Austin v. Rodman, 1 Hawks (N. C.) 194, 9 Am. Dec. 630; Commercial Bank v. Perry, 10 Rob. (La.) 61, 43 Am. Dec. 168.

² Austin v. Rodman, 1 Hawks (N. C.) 194, 9 Am. Dec. 630; Hart v. Smith, 15 Ala. 807, 50 Am. Dec. 161; Montelius v. Charles, 76 Ill. 303; Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; Bumont v. Pope, 7 Blackf. (Ind.) 367.

³ Townsley v. Sumrall, 27 U. S. (2 Pet.) 170, 178, 7 Law. Ed. 68; Fall River Union Bank v. Willard, 46 Mass. (5 Metc.) 216; Sweet v. Switt, 65 Mich. 90, 31 N. W. 767; House v. Adams, 48 Pa. 261; Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182. But see Allen v. Suydam, 20 Wend. (N. Y.) 321.

⁴ See ante, § 9.

⁵ Lester v. Given, 71 Ky. (8 Bush.) 357; Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182. Indeed, strictly speaking, there is no such thing as acceptance of a check in the ordinary sense of the term. Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182.

⁶ Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182.

⁷ Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182. See post, §§ 108-112.

⁸ Subdivision 3, same sections of negotiable instruments laws as last above cited.

⁹ Subdivision 2, same sections of negotiable instruments laws as last above cited.

The occasions stated in the act as requiring presentment for acceptance are to be deemed exclusive, for it is expressly provided that "in no other case is presentment for acceptance necessary in order to render any party to the bill liable."¹⁰

WHEN EXCUSED.

§ 72. Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases:

- 1. Where the drawee is dead, or has absconded, or is a fictitious person, or a person not having capacity to contract by bill;**
- 2. Where, after the exercise of reasonable diligence, presentment cannot be made;**
- 3. Where, although presentment has been irregular, acceptance has been refused on some other ground.**

Presentment for acceptance is excused, and the bill may be treated as dishonored for nonacceptance where the drawee is dead, or has absconded, or is a fictitious person, or a person without capacity to execute the bill, or where, after the exercise of reasonable diligence, presentment cannot be made, or where the presentment was irregular, but acceptance was refused on other grounds.¹¹ Dispensing with payment in the case of the drawee's death settles a question upon which the authorities previously

¹⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 143); Ariz. (§ 3446); Ill. (§ 142); Kan. (§ 150); Md. (§ 162); Mich. (§ 145); Neb. (§ 142); N. Y. (§ 240); Ohio (§ 3176 g); R. I. (§ 151); Wis. (§ 1681).

¹¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 148); Ariz. (§ 3451); Ill. (§ 147); Kan. (§ 155); Md. (§ 167); Mich. (§ 150); Neb. (§ 147); N. Y. (§ 245); Ohio (§ 3176 l); R. I. (§ 156); Wis. (§ 1681-5).

were not in accord.¹² Presentment is not necessary to charge one who, before the bill was drawn, promised unconditionally, in writing, to accept it.¹³

TIME FOR PRESENTMENT.

- § 73. Except as herein otherwise stated, the holder of a bill requiring presentment for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.
- § 74. Presentment for acceptance must be made at a reasonable hour, on a business day, and before the bill is overdue.
- § 75. Where the time for presentment falls on Sunday or a holiday, the act may be done on the next succeeding secular or business day. When Saturday is not otherwise a holiday, presentment may be made before twelve o'clock noon on that day.
- § 76. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

Holder must present or negotiate within reasonable time.

The holder of any bill which must be presented for acceptance must either present it or negotiate it within a reasonable time;

¹² See 1 Daniels, Negotiable Inst. (5th Ed.) p. 471, § 458.

¹³ Whilden v. Merchants' & Planters' Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

otherwise, the drawee and all indorsers will be discharged.¹⁴ Though it has been held that, when a bill is made payable at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, it may be presented for acceptance at any time.¹⁵ What constitutes a reasonable time depends upon the nature of the instrument, the usages of trade, and the circumstances of the case.¹⁶ A bill payable four months from date was presented for acceptance within a reasonable time where presented some five weeks before maturity;¹⁷ and presentment of a bill drawn in Georgia, payable in New York sixty days after sight, within two months and a half after the bill was drawn, was within a reasonable time.¹⁸ A foreign bill which is payable a certain number of days after sight need not be sent directly to the drawee for acceptance, but may be sent in the manner sanctioned by the customs of trade existing at the time, and, if such is the custom, may be sent to a broker in another country for negotiation, and presentment will be in

¹⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 144); Ariz. (§ 3447); Ill. (§ 143); Kan. (§ 151); Md. (§ 163); Mich. (§ 146); Neb. (§ 143); N. Y. (§ 241); Ohio (§ 3176 h); R. I. (§ 152); Wis. (§ 1681-1).

¹⁵ National Park Bank v. Laitta, 127 App. Div. 624, 111 N. Y. Supp. 927.

¹⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 193); Ariz. (§ 3489); Ill. (§ 192); Kan. (§ 4); Md. (§ 16); Mich. (§ 2); Neb. (§ 191); N. Y. (§ 4); Ohio (§ 3178b); R. I. (§ 4); Wis. (§ 1675).

¹⁷ Fugitt v. Nixon, 44 Mo. 295; Smith v. Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; Wallace v. Agry, 5 Mason, 118, Fed. Cas. No. 17,097.

¹⁸ Bachellor v. Priest, 29 Mass. (12 Pick.) 399.

¹⁹ Robinson v. Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259. But see Phoenix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756, where a delay of 21 days was held unreasonable, and Aymar v. Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538, where a delay of 29 days was excusable because of distance and the illness of the payee.

Delay in the mails is not chargeable to a holder who has sent bill for acceptance within a proper time. Walsh v. Blatchley, 6 Wis. 413.

See, also, generally, on subject of reasonable time, Prescott Bank v. Caverly, 73 Mass. (7 Gray) 217, 66 Am. Dec. 473; Gowen v. Jackson, 20 Johns. (N. Y.) 176.

time if made in the usual course of trade and not unreasonably delayed.¹⁹ An indorser for the accommodation of the drawer is not discharged by the fact that presentment is not made until maturity, where the bill was negotiated by the drawer under an agreement, to which the indorser was not privy, that the bill should not be presented until that time.²⁰ The drawer may waive presentment to the drawee by notifying the drawee not to pay.²¹ A waiver of acceptance by the drawer puts him in the same position as if the bill had been presented and acceptance refused.²²

Reasonable hour; business day.

Presentment for acceptance must be made before the bill is overdue, at a reasonable hour on a business day.²³ The rules governing presentment for payment govern presentment for acceptance in this respect.²⁴ But presentment, two days before maturity, of an unaccepted sight draft indorsed, "Accepted. Payable at F. & M. Bank," is conclusively presumed to be a presentment for acceptance, and not a presentment for payment.²⁵

When the day for presentment falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business

¹⁹ *Wallace v. Agry*, 4 Mason, 336, Fed. Cas. No. 17,096. See, also, on effect of custom and usage, *Jordan v. Wheeler*, 20 Tex. 698.

²⁰ *Fall River Union Bank v. Willard*, 46 Mass. (5 Metc.) 261.

²¹ *Neederer v. Barber*, Fed. Cas. No. 10,079.

²² *Carson's Adm'r's v. Russell*, 26 Tex. 452.

²³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 145); Ariz. (§ 3448); Ill. (§ 144); Kan. (§ 152); Md. (§ 164); Mich. (§ 147); Neb. (§ 144); N. Y. (§ 242); Ohio (§ 3176-1); R. I. (§ 153); Wis. (§ 1681-2).

The rule in *Dana v. Sawyer*, 22 Me. 244, 39 Am. Dec. 574, that a presentment for payment at or about midnight is not at a reasonable hour, would doubtless apply by analogy to a presentment for acceptance.

²⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 146); Ariz. (§ 3449); Ill. (§ 145); Kan. (§ 153); Md. (§ 165); Mich. (§ 148); Neb. (§ 145); N. Y. (§ 243); Ohio (§ 3176 j); R. I. (§ 154); Wis. (§ 1681-3).

See post, chapter XII, Presentment for Payment, § 182.

²⁵ *Burrus v. Life Ins. Co.*, 124 N. C. 9, 32 S. E. 323.

day.²⁶ Where Saturday is not otherwise a holiday, presentment may be made before twelve o'clock on that day.²⁷

Rule where time is insufficient.

If a holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day of its maturity, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.²⁸

PLACE OF PRESENTMENT.

§ 77. If a place of payment is named in the bill, presentment must be made there.

“ If a bill is one which requires a presentment for acceptance, and indicates a place where such presentment is to be made, a presentment should, of course, be made at that place. If a place of payment is named in the bill, presentment for acceptance may be made there.²⁹ It must be remembered, however, that, other feat-

²⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 85); Ariz. (§ 3388); Ill. (§ 85); Kan. (§ 92); Md. (§ 14); Mich. (§ 87); Neb. (§ 85); N. Y. (§ 145); Ohio (§ 3174 c); R. I. (§ 93); Wis. (§ 1678-15).

²⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 146); Ariz. (§ 3449); Ill. (§ 145); Kan. (§ 153); Md. (§ 165); Mich. (§ 148); Neb. (§ 145); N. Y. (§ 243); Ohio (§ 3176 j); R. I. (§ 154); Wis. (§ 1681-3).

²⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 147); Ariz. (§ 3450); Ill. (§ 146); Kan. (§ 154); Md. (§ 166); Mich. (§ 149); Neb. (§ 146); N. Y. (§ 244); Ohio (§ 3176 k); R. I. (§ 155); Wis. (§ 1681-4).

²⁹ Wolfe v. Jewett, 5 La. 614.

The charter of Greater New York (§§ 1499-1504, inclusive) provides that, whenever the board of health shall publicly designate any part of

ures requiring presentment being absent, presentment for acceptance is no longer necessary if the bill is drawn payable at the residence or place of business of the drawee.³⁰

BY WHOM PRESENTMENT MUST BE MADE.

§ 78. Presentment must be made by or on behalf of the holder.

Presentment for acceptance must be made by the holder or by one duly authorized to present the bill on his behalf.³¹ It may be, and usually is, made by a notary on behalf of the holder.³²

TO WHOM PRESENTMENT MUST BE MADE.

§ 79. Presentment must be made to the drawee or some person authorized to accept or refuse acceptance on his behalf.

§ 80. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

the city as the seat of a contagious or infectious disease, persons or firms doing business within the infected district shall designate in a register, to be kept by the city clerk, a place outside of the said district, but within the city, at which presentment of bills and notes may be made. If no registry is made, presentment may be made to the city clerk, and notice of protest served by depositing it in one of the post offices in said city.

³⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 143); Ariz. (§ 3446); Ill. (§ 142); Kan. (§ 150); Md. (§ 162); Mich. (§ 145); Neb. (§ 142); N. Y. (§ 240); Ohio (§ 3176 g); R. I. (§ 151); Wis. (§ 1681).

³¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 145); Ariz. (§ 3448); Ill. (§ 144); Kan. (§ 152); Md. (§ 164); Mich. (§ 147); Neb. (§ 144); N. Y. (§ 242); Ohio (§ 3176 i); R. I. (§ 153); Wis. (§ 1681-2).

³² *Wiseman v. Chiappella*, 64 U. S. (23 How.) 368, 16 Law. Ed. 597; *Whaley v. Houston*, 12 La. Ann. 585; *Stainback v. Bank of Virginia*, 11 Grat. (Va.) 260.

- § 81. Where the drawee is dead, presentment may be made to his personal representatives.
- § 82. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

To whom presentment must be made—Drawee or his agent.

It is a general rule that presentment for acceptance must be made to the drawee or to some person authorized to accept or refuse acceptance on his behalf.³³ If possible, presentment should be made to the drawee personally.³⁴

Same—Bill addressed to two or more drawees not partners.

If a bill is addressed to two or more drawees who are partners, presentment to one of them is, of course, sufficient;³⁵ but, if such drawees are not partners, presentment must be made to them all,

³³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 145); Ariz. (§ 3448); Ill. (§ 144); Kan. (§ 152); Md. (§ 164); Mich. (§ 147); Neb. (§ 144); N. Y. (§ 242); Ohio (§ 3176 i); R. I. (§ 153); Wis. (§ 1681-2).

In some of the negotiable instruments laws these sections required presentment to be made to the "drawer," but the obvious error was corrected in the Rhode Island law (§ 153), and by amendment in New York (Laws 1898, c. 336, § 30).

Cheek v. Roper, 5 Esp. 175.

³⁴ Wiseman v. Chiappella, 64 U. S. (23 How.) 368, 16 Law. Ed. 397; Sharpe v. Drew, 9 Ind. 281.

But presentment to a clerk of the drawee at his office, the drawee being absent, is sufficient. Whaley v. Houston, 12 La. Ann. 585; Stainback v. Bank of Virginia, 11 Grat. (Va.) 260.

The mere absence of the drawee of a bill payable after date, when called on for acceptance, is not a refusal to accept. Bank of Washington v. Triplett, 26 U. S. (1 Pet.) 25, 7 Law. Ed. 433. See, also, Bank of Red Oak v. Orvis, 42 Iowa, 691.

³⁵ Mt. Pleasant Branch of State Bank v. McLeran, 26 Iowa, 306, 1 Am. Rep. 273.

unless one has authority to accept or to refuse acceptance for all, in which case presentment to him is sufficient.³⁶

Same—Drawee dead.

If the drawee is dead, presentment may be made to his personal representative,³⁷ but, though advisable for purposes of protest, it is not necessary to make presentment in such case.³⁸

Same—Bankruptcy or insolvency of drawee.

Analogous to the rule that notice of dishonor may be given to the assignee of an insolvent party to commercial paper³⁹ is the rule that, if the drawee is a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment for acceptance may be made to him or his trustees or assignees.⁴⁰ It will be seen that the rule is in the alternative, and presentment to either will be good.

BILLS DRAWN IN SETS.

§ 83. Where a bill is drawn in a set, presentment of any one part for acceptance is sufficient.

A bill being drawn in a set, presentment of any one part for

³⁶ Subdivision 1, same sections of negotiable instruments laws as last above cited.

³⁷ Subdivision 2, same sections of negotiable instruments laws as last above cited.

³⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 148); Ariz. (§ 3451); Ill. (§ 147); Kan. (§ 155); Md. (§ 167); Mich. (§ 150); Neb. (§ 147); N. Y. (§ 245); Ohio (§ 31761); R. I. (§ 156); Wis. (§ 1681-5).

³⁹ Callahan v. Bank of Kentucky, 82 Ky. 231; American Nat. Bank v. Junk Bros. Lumber & Mfg. Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492. But see House v. Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813.

⁴⁰ Subdivision 3, same sections of negotiable instruments laws as last above cited.

acceptance is sufficient,⁴¹ and it will not be presumed that the drawee will accept more than one part.⁴²

NONACCEPTANCE.

§ 84. A bill is dishonored by nonacceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed is refused or cannot be obtained; or
2. When presentment for acceptance is excused and the bill is not accepted.

If a bill is duly presented for acceptance, and acceptance is refused or cannot be obtained, the bill is dishonored for nonacceptance.⁴³ It is also dishonored when presentment for acceptance is excused, for the reasons heretofore given, and the bill is not accepted.⁴⁴

RIGHTS AND DUTIES OF HOLDER.

- § 85. When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.
- § 86. But this right is lost if, after the bill has been duly presented for acceptance, and has not been accepted within the prescribed time, the holder does not treat the bill as dishonored by nonacceptance.

Where a bill is dishonored by nonacceptance, the holder has an immediate right of recourse against the drawers and indorsers

⁴¹ Walsh v. Blatchley, 6 Wis. 413.

⁴² Commercial Bank v. Routh, 7 La. Ann. 128.

⁴³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 149); Ariz. (§ 3452); Ill. (§ 148); Kan. (§ 156); Md. (§ 168); Mich. (§ 151); Neb. (§ 148); N. Y. (§ 246); Ohio (§ 3176 m); R. I. (§ 157); Wis. (§ 1681-6).

⁴⁴ Same sections of negotiable instruments laws as last above cited.

without presenting the bill for payment,⁴⁵ but this right is lost if, after the bill has been duly presented for acceptance, and has not been accepted within the prescribed time, the holder does not treat the bill as dishonored by nonacceptance, and protest it accordingly.⁴⁶ The liability of the drawers and indorsers being once fixed by a proper protest for nonacceptance, coupled with a proper notice, the right to recover against them is complete.⁴⁷

REFEREE IN CASE OF NEED.

§ 87. The drawer and any indorser of a bill may insert thereon the name of a person to whom the holder may resort in case the bill is dishonored by nonacceptance. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

The drawer or any indorser may insert in a bill of exchange the name of the person to whom the holder may resort in case of need, that is, if the bill is dishonored for nonacceptance or non-payment.⁴⁸ It is optional with the holder to resort to this referee

⁴⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 150); Ariz. (§ 3453); Ill. (§ 149); Kan. (§ 157); Md. (§ 169); Mich. (§ 152); Neb. (§ 149); N. Y. (§ 247); Ohio (§ 3176m); R. I. (§ 158); Wis. (§ 1681-7).

⁴⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 151); Ariz. (§ 3454); Ill. (§ 150); Kan. (§ 158); Md. (§ 170); Mich. (§ 153); Neb. (§ 150); N. Y. (§ 248); Ohio (§ 3176 o); R. I. (§ 159); Wis. (§ 1681-8).

⁴⁷ *Wallace v. Agry*, 4 Mason, 336, Fed. Cas. No. 17,096; *Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. 238; *Sterry v. Robinson*, 1 Day (Conn.) 11; *Pecquet v. Mager*, 7 La. 418; *Lenox v. Cook*, 8 Mass. 460; *Plato v. Reynolds*, 27 N. Y. 586; *Carson v. Russell*, 26 Tex. 452.

⁴⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 131); Ariz. (§ 3434); Ill. (§ 130); Kan. (§ 138); Md. (§ 150); Mich. (§ 133); Neb. (§ 130); N. Y. (§ 215); Ohio (§ 3175 v); R. I. (§ 139); Wis. (§ 1680-E).

in case of need,⁴⁹ but if the holder does resort to such referee, and the latter pays, he has recourse against the drawer for the full amount.⁵⁰

A drawee in "case of need" of a draft for the price of goods, who pays the draft, has a special property in the goods, though ownership remains in the consignor. *Basche v. Philips*, 155 Pa. St. 103.

By amendment in New York, the word "drawee" in the headline of the original law was changed to "referee." Laws 1898, c. 336, § 24.

Payment of bills of exchange *supra* protest or for honor, see post, § 253.

⁴⁹ Same sections of the negotiable instruments laws as last above cited. This seems to change the law. See 1 Daniel, *Negotiable Inst.*, § 111.

⁵⁰ *Chit. Bills*, 186; *Story, Bills*, § 65.

CHAPTER VIII.

ACCEPTANCE OF BILLS OF EXCHANGE.

- § 88. Necessity.
- § 89. Nature.
- § 90. Revocation.
- § 91. Necessity of Writing and Signature of Drawee.
- § 92. Acceptance on Bill.
- § 93. Acceptance on Separate Instrument.
- § 94. Implied Acceptance.
- § 95. Medium of Payment.
- § 96. Presumption of Consideration.
- § 97. Sufficiency of Consideration.
- § 98. Time of Acceptance.
- § 99. Insertion of Date.
- § 100. Insertion of Wrong Date.
- § 101. Date Prima Facie Correct.
- § 102. General and Qualified Acceptance.
- § 103. Qualified Acceptance.
- § 104. Right to General Acceptance.
- § 105. Incomplete and Overdue Paper.
- § 106. Bills Drawn in Sets.
- § 107. Acceptance on More Than One Part.
- § 108. Certification.
- § 109. Effect of Certification.
- § 110. Necessity of Writing.
- § 111. Certification by Drawer.
- § 112. Certification by Holder.
- § 113. Promise to Accept.

NECESSITY.

- § 88. The drawee is not liable on a bill or a check unless and until he accepts it, or promises to accept it.

The rule that the drawee is not liable on a bill unless and until he accepts it¹ is a logical outcome of the rule that a bill does not,

¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or.,

of itself, operate as an assignment of funds in the hands of the drawee.² Before acceptance, there is no liability on the part of the drawee, because there is no privity of contract between him and any of the other parties to the bill, and he is a stranger to the transaction.³

NATURE—REVOCATION.

§ 89. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer and means an acceptance completed by delivery or notification.

§ 90. An acceptance may be revoked before delivery of the accepted bill.

A contract relation between the drawee and the other parties to a bill is first effected by the acceptance of the bill by the drawee, as that is the signification of his assent to the order of

Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 127); Ariz. (§ 3430); Ill. (§ 126); Kan. (§ 134); Md. (§ 146); Mich. (§ 129); Neb. (§ 126); N. Y. (§ 211); Ohio (§ 3175 r); R. I. (§ 135); Wis. (§ 1680 a).

Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182; Luff v. Pope, 5 Hill (N. Y.) 413; Seattle Shoe Co. v. Packard, 43 Wash. 427, 86 Pac. 845; Baltimore & Ohio R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837.

² See ante, §§ 68-70.

³ Colorado Bank v. Boettcher, 5 Colo. 185, 40 Am. Rep. 142; Luff v. Pope, 5 Hill (N. Y.) 413; Bailey v. Southwestern Railroad Bank, 11 Fla. 266; Bullard v. Randall, 67 Mass. (1 Gray) 605, 61 Am. Dec. 433; Kimball v. Donald, 20 Mo. 577, 64 Am. Dec. 209; Hankin v. Squires, 5 Biss. 186, Fed. Cas. No. 6,025; Northumberland Bank v. McMichael, 106 Pa. 460, 51 Am. Rep. 529; Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182; Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845; Baltimore & Ohio R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837.

The same is true of an order. Woodruff v. Hensel, 5 Colo. App. 103, 37 Pac. 948; Weinstock v. Bellwood, 75 Ky. (12 Bush.) 139; Reilly v. Daly, 159 Pa. 605, 28 Atl. 493. But see Gurnee v. Hutton, 63 Hun, 197, 17 N. Y. Supp. 667, and Brem v. Covington, 104 N. C. 589, 10 S. E. 706,

the drawer.⁴ To be binding, however, an acceptance must be completed by delivery or notification.⁵ If an acceptance is dated, the date given is *prima facie* the true date of the acceptance.⁶

An acceptance may be revoked before the delivery of the accepted bill;⁷ but a drawee cannot revoke his acceptance, on discovering the insolvency of the drawer, after having indorsed his acceptance on the bill and redelivered it to the agent of the holder, though he has no funds of the drawer in his hands.⁸

NECESSITY OF WRITING.

§ 91. Under most of the negotiable instruments acts the acceptance must be in writing and signed by the drawee.

§ 92. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.

where orders were held to be equitable assignments, and the drawers to be liable without acceptance.

⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 132); Ariz. (§ 3435); Ill. (§ 131); Kan. (§ 139); Md. (§ 151); Mich. (§ 134); Neb. (§ 131); N. Y. (§ 220); Ohio (§ 3175w); R. I. (§ 140); Wis. (§ 1680 f).

⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 191); Ariz. (§ 3487); Ill. (§ 190); Kan. (§ 2); Md. (§ 14); Mich. (§ 2); Neb. (§ 189); N. Y. (§ 2); Ohio (§ 3178); R. I. (§ 2); Wis. (§ 1675).

⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 11); Ariz. (§ 3314); Ill. (§ 11); Kan. (§ 18); Md. (§ 30); Mich. (§ 13); Neb. (§ 11); N. Y. (§ 30); Ohio (§ 3171 j); R. I. (§ 19); Wis. (§ 1675-11).

⁷ Cox v. Troy, 5 Barn. & Ald. 474.

⁸ Trent Tile Co. v. Ft. Dearborn Nat. Bank, 54 N. J. Law, 33, 23 Atl. 423, distinguishing Cox v. Troy, 5 Barn. & Ald. 474.

§ 93. An acceptance on a separate instrument is binding only in favor of one to whom it is shown and who, on the faith thereof, receives the bill for value.

Must be in writing and signed by drawee.

An oral acceptance of a bill is good, in the absence of a statute requiring a written one.⁹ But in the states that have adopted the negotiable instruments law,¹⁰ and in some other states, the ac-

⁹ *Heitschmidt v. McAlpin*, 59 Ill. App. 231; *Spurgeon v. Swain*, 13 Ind. App. 188, 41 N. E. 397; *Pierce v. Kittredge*, 115 Mass. 374; *Spaulding v. Andrews*, 48 Pa. 411.

An oral acceptance is not within the statute of frauds. *Walton v. Man-deville* (Iowa) 5 N. W. 776. On a rehearing of the case last cited (56 Iowa, 597, 9 N. W. 913, 41 Am. Rep. 123), it was held that, if the drawee has no funds of the drawer on hand, his oral acceptance is within the statute, as a promise to pay the debt of another. To same effect see *Pike v. Irwin*, 1 Sandf. (N.Y.) 14; *Manley v. Geagan*, 105 Mass. 445.

Oral promise to accept, see post, § 113.

¹⁰ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 132); Ariz. (§ 3435); Ill. (§ 131); Kan. (§ 139); Md. (§ 151); Mich. (§ 134); Neb. (§ 131); N. Y. (§ 220); Ohio (§ 3175 w); R. I. (§ 140); Wis. (§ 1680 f).

Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064; *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837; *National Park Bank v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927. Complaint must allege written acceptance. *Wadhams v. Portland, V. & Y. R. Co.*, 37 Wash. 86, 79 Pac. 597. The negotiable instruments laws adopted in some of the states provide that the acceptance must be signed by the "drawer." This palpable error is corrected in the Rhode Island law (§ 140), and by amendment in New York (Laws 1898, c. 336, § 27).

Previously an oral acceptance was good in Connecticut (*Jarvis v. Wilson*, 46 Conn. 901, 33 Am. Rep. 18); Illinois (*Edward Hines Lumber Co. v. Anderson*, 141 Ill. App. 527); Massachusetts (*Pierce v. Kittredge*, 115 Mass. 374); New York, prior to Rev. St. pt. 2, c. 4, tit. 2, § 6 (*Leonard v. Mason*, 1 Wend. [N. Y.] 522; *Ontario Bank v. Worthington*, 12 Wend [N. Y.] 593, and *Johnson v. Clark*, 39 N. Y. 216); and North Carolina (*Short v. Blount*, 99 N. C. 49, 5 S. E. 190).

The negotiable instruments law affirms the rule previously existing in Alabama (Code, §§ 2101, 2102); Michigan (How. Ann. St. § 1583); Missouri (Rev. St. 1889, § 719. See *Haeberle v. O'Day*, 61 Mo. App.

ceptance must be in writing and signed by the drawee.¹¹ As no contrary provision for the acceptance of a promise to pay a check has been made, this provision is deemed to apply to checks.¹² In considering this section the distinction between an action founded on the instrument as an accepted bill or check, and one founded on a breach of a promise to accept, should be kept in mind.¹³ The best form of a general acceptance consists of the word "Accepted" written across the face of the bill, followed by the signature of the drawee, but the signature alone is a sufficient written acceptance,¹⁴ and other words than the word "Accepted" will suffice if the intention is to accept the bill.¹⁵ The New York court, in holding that there is a sufficient acceptance where the drawee writes his name across the face of the bill, states that "any words written by the drawee on a bill, not putting a direct negative upon its request, as 'Accepted,' 'Presented,' 'Seen,' the day of the month, or a direction to a third person to pay it, is *prima facie* a complete acceptance by the law merchant."¹⁶

Same—Acceptance on face of bill or on separate instrument.

The holder, on presenting a bill for acceptance, may require that the acceptance be written on the bill, and may treat the bill

390); Oregon (Hill's Ann. Laws, § 3194; *Erickson v. Inman, Poulson & Co.*, 34 Or. 44, 54 Pac. 949); Pennsylvania (Act May 10, 1881, P. L. 17). But in Pennsylvania the acceptor only could take advantage of the statute. *Ulrich v. Howner*, 156 Pa. 414, 27 Atl. 243.

¹¹ California (Civ. Code, § 3193); Maine (Rev. St. c. 32, § 10).

¹² *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182. Response of drawee bank over telephone that check was good held insufficient. *Id.*

¹³ *Boyce v. Edwards*, 29 U. S. (4 Pet.) 111, 7 Law. Ed. 22; *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

¹⁴ *Fowler v. Gate City Nat. Bank*, 88 Ga. 29, 13 S. E. 831; *Kaufman v. Barringer*, 20 La. Ann. 419; *Mechanics' Bank v. Yager*, 62 Miss. 529; *Wheeler v. Webster*, 1 E. D. Smith (N. Y.) 1; *Spear v. Pratt*, 2 Hill (N. Y.) 582, 38 Am. Dec. 600.

¹⁵ *Spear v. Pratt*, 2 Hill (N. Y.) 582, 38 Am. Dec. 600; *Vanstrum v. Liljengren*, 37 Minn. 191, 33 N. W. 555; *Cortelyou v. Maben*, 22 Neb. 697, 36 N. W. 159, 3 Am. St. Rep. 284.

¹⁶ *Spear v. Pratt*, 2 Hill (N. Y.) 582, 38 Am. Dec. 600.

as dishonored if this is refused.¹⁷ This section is not confined to sight bills, but seems to be applicable to all bills of exchange.¹⁸ An acceptance written on a paper other than the bill itself binds the acceptor only in favor of one to whom it is shown, and who, on the faith thereof, receives the bill for value.¹⁹

IMPLIED ACCEPTANCE.

§ 94. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after the delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

An exception to the rule that the acceptance must be in writing and signed by the drawee is found in the rule that, if a drawee to whom a bill is delivered for acceptance destroys it, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or not accepted, he will be deemed to have accepted it.²⁰ Under

¹⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 133); Ariz. (§ 3436); Ill. (§ 132); Kan. (§ 140); Md. (§ 152); Mich. (§ 135); Neb. (§ 132); N. Y. (§ 221); Ohio (§ 3175 x); R. I. (§ 141); Wis. (§ 1680 g).

¹⁸ *National Park Bank v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927.

¹⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 134); Ariz. (§ 3437); Ill. (§ 133); Kan. (§ 141); Md. (§ 153); Mich. (§ 136); Neb. (§ 133); N. Y. (§ 222); Ohio (§ 3175 y); R. I. (§ 142); Wis. (§ 1680 h).

See, also, *Fairchild v. Feltman*, 32 Hun (N. Y.) 398.

Acceptance may be made by telegraph. In *re Armstrong*, 41 Fed. 381; *Garrettson v. North Atchison Bank*, 39 Fed. 163, 7 L. R. A. 428; *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

²⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 137); Ariz. (§ 3440); Ill.

the great weight of authority as it existed prior to the negotiable instruments law, mere retention of a bill could not amount to an implied acceptance, in the absence of contract or settled course of dealing between the parties to the contrary. This rule is that of the negotiable instruments law, and under it some affirmative tortious act on the part of the drawee is required, and a mere retention of the instrument beyond the proper time will not amount to an acceptance.²¹ In speaking of this general question the Wisconsin supreme court has, in a case dealing with a non-negotiable bill of exchange, used the following language: "Upon the question of law as to when implied or constructive acceptance takes place, the authorities are reasonably clear and approximately unanimous. Upon delivery for acceptance, the drawee is not bound to act at once. He has a right to a reasonable time—usually twenty-four hours—to ascertain the state of accounts between himself and the drawer, and until expiration of that time the holder has no right to demand an answer, nor without categorical answer, to deem the bill either accepted or dishonored; not accepted, because of the right of the drawee to consider before he binds himself; not dishonored because both drawer and drawee have the right that their paper be not discredited during such period of investigation. After the expiration of that reasonable time the holder has a right to know whether the drawee assumes

(§ 136); Kan. (§ 144); Md. (§ 156); Mich. (§ 139); Neb. (§ 136); N. Y. (§ 225); Ohio (§ 3176 a); R.I. (§ 145); Wis. (§ 1680 k).

²¹ This construction of the rule is expressly recognized by the negotiable instruments law as adopted in Wisconsin. Negotiable Inst. Law, § 1680 k.

Colorado Nat. Bank v. Boettcher, 5 Colo. 185, 40 Am. Rep. 142; Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; Short v. Blount, 99 N. C. 49, 5 S. E. 190; Matteson v. Moulton, 79 N. Y. 627. This decision was based on 1 Rev. St. N. Y. p. 769, § 11, which is identical with the rule of the negotiable instruments laws given in the text. The Missouri statute (Rev. St. § 724) is the same, and has been construed in the same way. Dickenson v. Marsh, 57 Mo. App. 566. See Austin v. Papanti, 197 Mass. 584, 83 N. E. 1088, where one turned an order over to the drawee who had funds to pay the same, and the court held there was no acceptance, saying "that he could have accepted the order if he had chosen and that he had money enough to pay is not enough."

liability to him by accepting, and, if not, he has a right to a return of the document, so that he may protest or otherwise proceed to preserve his rights against the drawer. The consensus of authority is, however, that the duty rests on the holder to demand either acceptance or return of the bill, and that mere inaction on the part of the drawee has no effect. After the expiration of this time for investigation, the drawee may by retention of the bill, accompanied by other circumstances, become bound as an acceptor; not, however, by mere retention. There seem to be two classes of conduct recognized by the authorities as charging the drawee—one purely contractual, as where the retention is accompanied by such custom, promise or notification as to warrant the holder to the knowledge of the drawee, in understanding that the retention declares acceptance; the other, where the conduct of the drawee is substantially tortious, and amounts to a conversion of the bill. This is the phase of conduct which our negotiable instruments law has undertaken to define and limit as refusal (not mere neglect) to return the bill or destruction of it; reiterating the common-law rule that mere retention of the bill is not acceptance. The doctrine of constructive acceptance is based on the general principles of estoppel. If the conduct of the drawee will prejudice the existing rights of the holder, unless it means acceptance, and the drawee has knowledge of such fact, he is estopped to deny the only purpose which could render his conduct innocuous; namely, the acceptance of the bill. This underlying principle suggests the reasons for many of the limitations upon the implication of acceptance from conduct; as, for example, that such implication arises only when the bill is presented for acceptance, and that no one but the holder (payee or indorsee) can make such technical presentment. Only when the drawee knows that acceptance is expected would he suppose that his conduct can lead to a belief that he does accept. Only when the presentment is by the holder, whose conduct and rights must be affected by acceptance or refusal, is the drawee charged by the strict rules of the law merchant with notice that his conduct may so injuriously affect the person delivering the bill to him.”²² In

²² *Westberg v. Chicago Lumber & Coal Co.*, 117 Wis. 589, 94 N. W. 572

apparent contradiction to the plain import of the words of the statute, some courts have held that, under the statute, a mere retention is sufficient to constitute acceptance.²³ In one of these the following language is used: "It is apparent, we think, that in the enactment of this section, the legislature regarded the presentation for acceptance as a demand for acceptance, which, when the bill is retained by the drawee, implies a demand for its return within the time specified, and that, therefore, the neglect or failure to return is a refusal to return the bill."²⁴ Both of the cases cited as holding contrary to what is believed to be the correct view were cases of checks and might, perhaps, be justified on the theory that retention is contrary to a settled business custom and hence an acceptance; but to hold bare retention an acceptance is believed erroneous. But a retention of the instrument, coupled with a written statement by the drawee, in a letter to the payee, that it "will be disposed of in some way or other when I am there," amounts to an acceptance.²⁵

MEDIUM OF PAYMENT.

§ 95. The acceptance must not provide that the drawee will perform his promise by any other means than the payment of money.

Inasmuch as the negotiable instruments law requires a bill of exchange to pay a sum certain in money,²⁶ the subsequent provision that the acceptance of the bill must not express that the drawee will perform his promise by any other means than the payment of money²⁷ is only logical.

²³ *Wisner v. First Nat. Bank*, 220 Pa. 121, 68 Atl. 955; *State Bank v. Weiss*, 46 Misc. 93, 91 N. Y. Supp. 276.

²⁴ *Wisner v. First Nat. Bank*, 220 Pa. 121, 68 Atl. 955.

²⁵ *Hough v. Loring*, 41 Mass. (24 Pick.) 254.

²⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 126); Ariz. (§ 3429); Ill. (§ 125); Kan. (§ 133); Md. (§ 145); Mich. (§ 128); Neb. (§ 125); N. Y. (§ 210); Ohio (§ 3175q); R. I. (§ 134); Wis. (§ 1680).

²⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La.,

CONSIDERATION.

- § 96. An acceptance is presumed to have been based on a valuable consideration.
- § 97. Value is any consideration sufficient to support a simple contract, including an antecedent or precedent debt.

Consideration for acceptance.

It is presumed that an acceptance was based on a sufficient and valuable consideration,²⁸ for the acceptance, of itself, operates as an admission that the drawee has funds of the drawer in his hands.²⁹ This presumption may be rebutted by evidence as to the relations and dealings of the parties.³⁰ Value is any consideration sufficient to support a simple contract. A present existing debt of the drawee to the drawer is a sufficient consideration for an acceptance by the former,³¹ and so is a debt due from the

Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 132); Ariz. (§ 3435); Ill. (§ 131); Kan. (§ 139); Md. (§ 151); Mich. (§ 134); Neb. (§ 131); N. Y. (§ 220); Ohio (§ 3175 w); R. I. (§ 140); Wis. (§ 1680 f).

²⁸ *Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458; *National Park Bank v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927.

Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 24); Ariz. (§ 3327); Ill. (§ 24); Kan. (§ 31); Md. (§ 43); Mich. (§ 26); Neb. (§ 24); N. Y. (§ 50); Ohio (§ 3171 w); R. I. (§ 32); Wis. (§ 1675-50).

²⁹ *State Bank v. Clark*, 1 Hawks (N. C.) 36; *Gillilan v. Myers*, 31 Ill. 525; *Kendall v. Galvin*, 15 Me. 131, 32 Am. Dec. 141; *Byrd v. Bertrand*, 2 Eng. (Ark.) 321; *Alvord v. Baker*, 9 Wend. (N. Y.) 323; *Richardson v. Carpenter*, 46 N. Y. 660; *Raborg v. Peyton*, 15 U. S. (2 Wheat.) 385, 4 Law. Ed. 144.

³⁰ *Parks v. Nichols*, 20 Ill. App. 143; *Hidden v. Waldo*, 55 N. Y. 295.

³¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 25); Ariz. (§ 3328); Ill. (§ 25); Kan. (§ 32); Md. (§ 44); Mich. (§ 27); Neb. (§ 25); N. Y. (§ 51); Ohio (§ 3171 x); R. I. (§ 33); Wis. (§ 1675-51).

First Nat. Bank v. Snell, 32 Iowa, 167; *Fisher v. Beckwith*, 19 Vt. 31 46 Am. Dec. 174.

drawee to a third person.³² A shipment of merchandise by the debtor to the drawee is a sufficient consideration for an acceptance by the latter of an order in favor of the creditor for the proceeds of the goods,³³ and the transfer to the acceptor of a bill of lading is a sufficient consideration for his acceptance, though the cargo covered by the bill was practically worthless.³⁴ Services rendered by plaintiff at the request of defendant, in procuring the withdrawal of a contractor's objections to plaintiff's account for materials furnished for a building on which defendant was loaning money, is a sufficient consideration for an acceptance by defendant of an order from the contractor for the value of such materials;³⁵ and forbearance to file a mechanic's lien against a building belonging to the drawer is a sufficient consideration for an acceptance by the drawee.³⁶ As between the payee and the acceptor, the acceptor cannot set up a want of consideration,³⁷ and one of several joint acceptors cannot defeat a recovery as to himself by showing that his acceptance was for accommodation, and was made after the others had accepted.³⁸

TIME OF ACCEPTANCE.

§ 98. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the date of presentation.

What constitutes a reasonable time after presentment for the drawee to decide on acceptance or not is now definitely fixed by

³² *Arnold v. Sprague*, 34 Vt. 402.

³³ *Olds Wagon-Works v. Coombs*, 124 Ind. 62, 24 N. E. 589.

³⁴ *Kelly v. Lynch*, 22 Cal. 661.

³⁵ *Nesbit v. Bendheim*, 15 N. Y. Supp. 300.

³⁶ *Flanagan v. Mitchell*, 16 Daly, 223, 10 N. Y. Supp. 234.

³⁷ *Townsley v. Sumrall*, 27 U. S. (2 Pet.) 170, 7 Law. Ed. 68; *Iselin v. Chemical Nat. Bank*, 16 Misc. 437, 40 N. Y. Supp. 388; *Grant v. Ellicott*, 7 Wend. (N. Y.) 227; *Meyer v. Beardsley*, 30 N. J. Law, 236.

³⁸ *McNabb v. Tally*, 27 La. Ann. 640.

the negotiable instruments laws at twenty-four hours.³⁹ The acceptance, when given, dates as of the day of presentment.⁴⁰

§ 99. Where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance and the instrument will be payable accordingly.

§ 100. The insertion of a wrong date does not avoid the instrument in the hands of a holder in due course.

§ 101. Where an acceptance is dated, such date is deemed *prima facie* correct.

Insertion of date.

By express enactment, where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument will be payable accordingly.⁴¹ The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but, as to him, the date so inserted is to be regarded as the true date.⁴² The language of the act would seem to warrant the construction that the rule would be otherwise as

³⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 136); Ariz. (§ 3439); Ill. (§ 135); Kan. (§ 143); Md. (§ 155); Mich. (§ 138); Neb. (§ 135); N. Y. (§ 224); Ohio (§ 3176); R. I. (§ 144); Wis. (§ 1680 j).

Heretofore in Massachusetts and Rhode Island the drawee had until two o'clock of the day following presentment for acceptance. Pub. St. Mass. 1882, c. 77, § 17; Gen. St. R. I. c. 166, § 5.

⁴⁰ Same sections of negotiable instruments laws as last above cited.

⁴¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 13); Ariz. (§ 3316); Ill. (§ 13); Kan. (§ 20); Md. (§ 32); Mich. (§ 15); Neb. (§ 13); N. Y. (§ 32); Ohio (§ 3171 i); R. I. (§ 21); Wis. (§ 1675-13).

⁴² Same sections of negotiable instruments laws as last above cited.

to one becoming a party prior to the completion of the instrument.⁴³

Date prima facie correct.

By the express provisions of the act when an acceptance is dated, such date is prima facie deemed the true date of the acceptance.⁴⁴

GENERAL AND QUALIFIED ACCEPTANCE.

§ 102. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

An acceptance of the order of the drawer without qualification, and according to the tenor of the bill, is a general acceptance.⁴⁵

⁴³ Same sections negotiable instruments laws last above cited, construed with Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§§ 14, 124, 125); Ariz. (§§ 3317, 3427, 3428); Ill. (§§14, 123, 124); Kan. (§§ 21, 131, 132); Md. (§§ 33, 143, 144); Mich. (§§16, 126, 127); Neb. (§§ 14, 123, 124); N. Y. (§§ 33, 205, 206); Ohio (§§3171 m, 3175 o, 3175 p); R. I. (§§ 22, 132, 133); Wis. (§§ 1675-14, 1679-5, 1679-6). But see Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 6); Ariz. (§ 3309); Ill. (§ 6); Kan (§ 13); Md. (§ 25); Mich. (§ 8); Neb. (§ 6); N. Y. (§ 25); Ohio (§ 3171 e); R. I. (§ 14); Wis. (§ 1675-6).

⁴⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 11); Ariz. (§ 3314); Ill. (§ 11); Kan. (§ 18); Md. (§ 30); Mich. (§ 13); Neb. (§ 11); N. Y. (§ 30); Ohio (§ 3171 j); R. I. (§ 19); Wis. (§ 1675-11).

See, also, ante, chapter III, § 16.

⁴⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 139); Ariz. (§ 3442); Ill. (§ 138); Kan. (§ 146); Md. (§ 158); Mich. (§ 141); Neb. (§ 138); N. Y. (§ 227); Ohio (§ 3176 c); R. I. (§ 147); Wis. (§ 1680 m).

Acceptance qualified in form construed to be general, see post, § 103.

Any acceptance which varies the effect of the bill as drawn is a qualified acceptance.⁴⁶

QUALIFIED ACCEPTANCE.

§ 103. An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;

Qualification.—But an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere;

4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

The most common form of qualified acceptance is the conditional acceptance, which makes payment by the acceptor depend-

⁴⁶ Same sections of negotiable instruments laws last above cited. The provisions of the English Bills of Exchange Act 1882 (45 and 46 Vict. c. 61, § 19) are the same as those of the negotiable instruments laws, and under them it has been held that where a bill was drawn by L. D. F. payable "to the order of L. D. F.," and the drawees struck out the word "order," and accepted "in favor of L. D. F. only, payable at the Alliance Bank, London," the acceptance did not vary the effect of the bill as drawn, and hence was not a qualified acceptance, but was a general acceptance. The court in this case said that the words "accepted in favor of L. D. F." indicated an acceptance "of a bill of which F. is the drawer or payee," and that the mercantile effect of the bill was not altered by adding the word "only," as it indicated merely "that the acceptance is of a bill of which F. is the only drawer." *Decroix, Verley et Cie v. Meyer & Co.*, 25 Q. B. Div. 343.

ent on the fulfillment of a condition therein stated.⁴⁷ An acceptance is conditional if it is to pay "according to contract,"⁴⁸ or on the completion of a building according to contract,⁴⁹ or to pay when in funds,⁵⁰ or out of a particular fund.⁵¹ The condition must be expressed.⁵² Sometimes an acceptance expressly conditional in form is not such in fact, but is an absolute, unqualified acceptance.⁵³ The condition may be subsequently waived by the acceptor.⁵⁴

Under the negotiable instruments acts, an acceptance to pay part only of the sum named in the bill,⁵⁵ or one which is specific-

⁴⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 141); Ariz. (§ 3444); Ill. (§ 140); Kan. (§ 148); Md. (§ 160); Mich. (§ 143); Neb. (§ 140); N. Y. (§ 229); Ohio (§ 3176 e); R. I. (§ 149); Wis. (§ 1680 o).

Conditional promise to accept, see ante, § 113.

⁴⁸ Haseltine v. Dunbar, 62 Wis. 162, 22 N. W. 165.

⁴⁹ Newhall v. Clark, 57 Mass. (3 Cush.) 376, 50 Am. Dec. 741; Somers v. Thayer, 115 Mass. 163; Greene v. Duncan, 37 S. C. 239, 15 S. E. 956. But see Hughes v. Fisher, 10 Colo. 383, 15 Pac. 702.

⁵⁰ Campbell v. Pettengill, 7 Me. 126, 20 Am. Dec. 349; Hunt v. Williams, 15 R. I. 595, 10 Atl. 645; Owen v. Iglandor, 44 Tenn. (4 Cold.) 15; Lawrence v. Phipps, 67 Hun, 61, 22 N. Y. Supp. 16.

Acceptance when "in funds" means cash funds. Campbell v. Pettengill, 7 Me. 126, 20 Am. Dec. 349.

The acceptor is liable when the money is placed to his credit, though he has not actually received it. Wallace v. Douglas, 116 N. C. 659, 21 S. E. 387. He must pay out of the first funds of the drawer that he receives. Wintermute v. Post, 24 N. J. Law, 420; Perry v. Harrington, 43 Mass. (2 Metc.) 368.

⁵¹ Flanagan v. Mitchell, 16 Daly, 223, 10 N. Y. Supp. 234. See, also, Robinson v. Gray, 17 Misc. 341, 39 N. Y. Supp. 1066; Hazelton Mercantile Co. v. Union Imp. Co., 143 Pa. 573, 22 Atl. 906.

⁵² Coffman v. Campbell, 87 Ill. 98; Haines v. Nance, 52 Ill. App. 406.

⁵³ Cowan v. Hallack, 9 Colo. 572, 13 Pac. 700; Brabazon v. Seymour, 42 Conn. 551, where a conditional acceptance was held to become absolute on fulfillment of the condition.

⁵⁴ Hough v. Loring, 41 Mass. (24 Pick.) 254.

The acceptor cannot, after defeating the condition by his own acts, set it up as a defense to an action on the acceptance. Risley v. Smith, 64 N. Y. 576; Herter v. Goss & Edsall Co., 57 N. J. Law, 42, 30 Atl. 252.

⁵⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La.,

ally qualified or limited as to time,⁵⁶ or an acceptance by one or more of several drawees, less than all,⁵⁷ are qualified acceptances, as is an acceptance to pay only at a particular place.⁵⁸ The vital word in this last clause is "only," for whatever may have been the rule heretofore, it is now provided by the negotiable instruments laws that an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere.⁵⁹

§ 104. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonored by nonacceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or indorser receives notice of a qualified acceptance, he must, within a reasonable time, ex-

Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 141); Ariz. (§ 3444); Ill. (§ 140); Kan. (§ 148); Md. (§ 160); Mich. (§ 143); Neb. (§ 140); N. Y. (§ 229); Ohio (§ 3176 e); R. I. (§ 149); Wis. (§ 1680 o).

Phillips v. Frost, 29 Me. 77. But see Peterson v. Hubbard, 28 Mich. 197.

⁵⁶ Subdivision 4, same sections of negotiable instruments laws as last above cited.

Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555.

⁵⁷ Subdivision 5, same sections of negotiable instruments laws as last above cited.

⁵⁸ Subdivision 3, same sections of negotiable instruments laws as last above cited.

Wallace v. McConnell, 38 U. S. (13 Pet.) 136, 10 Law. Ed. 95; Bank of U. S. v. Smith, 24 U. S. (11 Wheat.) 172, 6 Law. Ed. 443.

⁵⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 140); Ariz. (§ 3443); Ill. (§ 139); Kan. (§ 147); Md. (§ 159); Mich. (§ 142); Neb. (§ 139); N. Y. (§ 228); Ohio (§ 3176 d); R. I. (§ 148); Wis. (§ 1680 n).

Except as qualified by statutory enactment, the English rule was different. Rome v. Young, 2 Brod. & B. 165.

press his dissent to the holder, or he will be deemed to have assented thereto.

The holder has a right to a general unqualified acceptance by the drawee, and may refuse to take a qualified acceptance, and may treat the bill as dishonored by nonacceptance if he does not obtain an unqualified acceptance.⁶⁰ Unless the drawer and indorsers have expressly or impliedly authorized or subsequently assented to the taking of a qualified acceptance, they are discharged from liability in case one is taken,⁶¹ but, if a drawer or indorser is notified of a qualified acceptance, he must express his dissent to the holder within a reasonable time, or he will be deemed to have assented to such acceptance.⁶² In determining what is a "reasonable time," regard is to be had to the nature of the instrument, the usage of trade or business, if any, and the facts of the particular case.⁶³

INCOMPLETE, OVERDUE PAPER AND BILLS DRAWN IN SETS.

§ 105. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

A bill may be accepted before it is signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has

⁶⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 142); Ariz. (§ 3445); Ill. (§ 141); Kan. (§ 149); Md. (§ 161); Mich. (§ 144); Neb. (§ 141); N. Y. (§ 230); Ohio (§ 3176 f); R. I. (§ 150); Wis. (§ 1680 p).
Shakelford v. Hooker, 54 Miss. 716.

⁶¹ Same sections of negotiable instruments laws as last above cited.

⁶² Same sections of negotiable instruments laws as last above cited.

⁶³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La.,

been dishonored, by a refusal to accept or pay.⁶⁴ This is in accordance with the common law.⁶⁵ But when a bill payable after sight is dishonored by nonacceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.⁶⁶

§ 106. When a bill is drawn in sets, the acceptance may be written on any part and it must be written on one part only.

§ 107. If the drawee accepts more than one part and such accepted parts are negotiated to different holders in due course, he is liable on every such part[¶] as if it were a separate bill.

Where a bill is made out in a set, the acceptance may be written on any part, but must be written on one part only.⁶⁷ But if the drawee accept more than one part, and they are thereafter negotiated to different holders in due course, the drawee is liable on each part accepted, as on a separate bill.⁶⁸ Where the first and

Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 193); Ariz. (§ 3489); Ill. (§ 192); Kan. (§ 4); Md. (§ 16); Mich. (§ 2); Neb. (§ 191); N. Y. (§ 4); Ohio (§ 3178 b); R. I. (§ 4); Wis. (§ 1675).

⁶⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 138); Ariz. (§ 3441); Ill. (§ 137); Kan. (§ 145); Md. (§ 157); Mich. (§ 140); Neb. (§ 137); N. Y. (§ 226); Ohio (§ 3176B); R. I. (§ 146); Wis. (§ 1680 L).

⁶⁵ *Harvey v. Cane*, 34 Law T. (N. S.) 64; *Spalding v. Andrews*, 48 Pa. 413; *Grant v. Shaw*, 16 Mass. 344.

⁶⁶ Same sections of negotiable instruments laws as last above cited.

⁶⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 181); Ariz. (§ 3484); Ill. (§ 180); Kan. (§ 188); Md. (§ 200); Mich. (§ 183); Neb. (§ 180); N. Y. (§ 313); Ohio (§ 3177 r); R. I. (§ 189); Wis. (§ 1681-38).

⁶⁸ Same sections of negotiable instruments laws as last above cited.

See, also, *Bank of Pittsburgh v. Neal*, 63 U. S. (22 How.) 96, 16 Law. Ed. 248.

second of a set are accepted, the drawer is liable on both, if he authorized or ratified the negotiation, and there was no collusion between the acceptor and the holders.⁶⁹

CERTIFICATION.

§ 108. A bank is not liable to the holder of a check unless and until it accepts or certifies it.

As a logical outcome of the rule that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank,⁷⁰ the negotiable instruments laws provide that the bank is not liable to the holder unless and until it accepts or certifies the check.⁷¹

§ 109. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

The certification of a check by the bank on which it is drawn is equivalent to an acceptance,⁷² and, in general, gives rise to the same rights and liabilities.⁷³

⁶⁹ *Wright v. McFall*, 8 La. Ann. 120.

⁷⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 189); Ariz. (§ 3487); Ill. (§ 188); Kan. (§ 196); Md. (§ 208); Mich. (§ 191); Neb. (§ 188); N. Y. (§ 325); Ohio (§ 3177 z); R. I. (§ 197); Wis. (§ 1684-5).

⁷¹ Same sections negotiable instruments laws last above cited. *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837; *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182.

⁷² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 187); Ariz. (§ 3487); Ill. (§ 186); Kan. (§ 194); Md. (§ 206); Mich. (§ 189); Neb. (§ 186); N. Y. (§ 323); Ohio (§ 3177 x); R. I. (§ 195); Wis. (§ 1684-3).

First Nat. Bank v. Currie, 147 Mich. 72, 13 Det. Leg. N. 965, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698. Admits genuineness of maker's signature. *Adam v. Manufacturers' & Traders' Nat. Bank*, 63 Misc. 403, 116 N. Y. Supp. 595.

⁷³ See post, chapter XI, § 153.

§ 110. The certification must be in writing signed by the bank.

While at common law an oral certification or acceptance was good,⁷⁴ the rule has been changed by the negotiable instruments law which requires all acceptances to be in writing and signed by the drawee.⁷⁵

EFFECT OF CERTIFICATION AS A RELEASE FROM LIABILITY.**§ 111. Where the drawer procures the certification of a check, he still remains liable thereon.****§ 112. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.****Certification—By drawer.**

Where the drawer of a check procures its certification by the bank, he still remains liable;⁷⁶ and the same rule applies if the

⁷⁴ Farmers' & Merchants' Bank v. Dunbier, 32 Neb. 487, 49 N. W. 376.

An oral promise to pay by a drawee bank, in which the drawer has no funds, is within the statute of frauds. Morse v. Massachusetts Nat. Bank, Fed. Cas. No. 9,857. See, also, cases cited in note 8 of this chapter.

A promise by telegraph to pay a check is a good certification. Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773; Wells v. Western Union Tel. Co. (Iowa) 123 N. W. 371.

⁷⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 132); Ariz. (§ 3435); Ill. (§ 131); Kan. (§ 139); Md. (§ 151); Mich. (§ 134); Neb. (§ 131); N. Y. (§ 220); Ohio (§ 3175w); R. I. (§ 140); Wis. (§ 1680f).

Oral acceptance cannot be enforced. Telephone response that check was good. Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182.

See ante, this chapter, § 91.

⁷⁶ Minot v. Russ, 156 Mass. 458, 31 N. E. 489, 32 Am. St. Rep. 472, 16 L. R. A. 510; Times Square Automobile Co. v. Rutherford Nat. Bank (N. J. Err. & App.) 73 Atl. 479.

See, also, Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497; First Nat. Bank v. Whitman, 94 U. S. 343, 29 Law. Ed. 229; Metropolitan Nat. Bank v. Jones, 137 Ill. 417, 27 N. E. 533; Larsen v. Breene, 12 Colo.

certification is made before delivery to the payee though at the latter's request.⁷⁷

Same—By holder.

But, where the holder obtains the certification, the drawer and all prior indorsers are discharged from liability.⁷⁸ Such certification creates a new contract between the holder and the drawee,⁷⁹ and the holder may sue the party certifying.⁸⁰

PROMISE TO ACCEPT.

§ 113. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

An unconditional written promise to accept a bill before it is drawn operates as an acceptance in favor of every person who,

480; *Andrews v. German Nat. Bank*, 56 Tenn. (9 Heisk.) 211, 24 Am. Rep. 300; *Oyster & Fish Co. v. National Lafayette Bank*, 51 Ohio St. 106, 36 N. E. 833.

⁷⁷ *Born v. First Nat. Bank*, 123 Ind. 78, 24 N. E. 173, 18 Am. St. Rep. 312, 7 L. R. A. 442.

⁷⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 188); Ariz. (§ 3487); Ill. (§ 187); Kan. (§ 195); Md. (§ 207); Mich. (§ 190); Neb. (§ 187); N. Y. (§ 324); Ohio (§ 3177 y); R. I. (§ 196); Wis. (§ 1684-4).

Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Girard Bank v. Bank of Pennsylvania Tp.*, 39 Pa. 92, 80 Am. Dec. 507; *First Nat. Bank v. Currie*, 147 Mich. 72, 13 Det. Leg. N. 965, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698; *Times Square Automobile Co. v. Rutherford Nat. Bank* (N. J. Err. & App.) 73 Atl. 479.

⁷⁹ *First Nat. Bank v. Currie*, 147 Mich. 72, 13 Det. Leg. N. 965, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698; *Times Square Automobile Co. v. Rutherford* (N. J. Err. & App.) 73 Atl. 479.

⁸⁰ *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83.

on the faith thereof, receives the bill for value.⁸¹ In the language of Chief Justice Marshall: "The prevailing inducement for considering a promise to accept or an acceptance is that credit is thereby given to the bill,"⁸² and this credit may be as well imparted to the bill before its date as afterwards.⁸³

To constitute the promise an acceptance, the bill must have been taken on the faith thereof.⁸⁴ The fact that it is so taken constitutes a sufficient consideration for the promise to accept.⁸⁵

⁸¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 135); Ariz. (§ 3438); Ill. (§ 134); Kan. (§ 142); Md. (§ 154); Mich. (§ 137); Neb. (§ 134); N. Y. (§ 223); Ohio (§ 3175 z); R. I. (§ 143); Wis. (§ 1680 i).

As to what constitutes a promise to accept, see *North Atchison Bank v. Garretson*, 2 C. C. A. 145, 51 Fed. 168; *First Nat. Bank v. Clark*, 61 Md. 400, 48 Am. Rep. 114; *Burke v. Utah Nat. Bank*, 47 Neb. 247, 66 N. W. 295; *Merchants' Nat. Bank of Canada v. Griswold*, 72 N. Y. 472, 28 Am. Rep. 159; *Union Bank v. Shea*, 57 Minn. 180, 58 N. W. 985.

Under the Missouri statute (Rev. St. § 535), which is the same as the negotiable instruments laws on this point, it has been held that a letter from the drawer to the acceptor directing him to send a renewal, and draw on the writer at sight for the amount of the first bill at maturity, operated as an actual acceptance of the sight draft. *Adoue v. Fox*, 30 Mo. App. 98. See, also, *Valle v. Cerre*, 36 Mo. 575, 88 Am. Dec. 161.

Heretofore an oral promise to accept was good. *Kelley v. Greenough*, 9 Wash. 659, 38 Pac. 158; *Williams v. Winans*, 14 N. J. Law, 339.

⁸² *Coolidge v. Payson*, 15 U. S. (2 Wheat.) 66, 4 Law. Ed. 185. The court adds: "This court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." *Id.*

⁸³ *Coolidge v. Payson*, 15 U. S. (2 Wheat.) 66, 4 Law. Ed. 185. See, also, *Steman v. Harrison*, 42 Pa. 49.

⁸⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 135); Ariz. (§ 3438); Ill. (§ 134); Kan. (§ 142); Md. (§ 154); Mich. (§ 137); Neb. (§ 134); N. Y. (§ 223); Ohio (§ 3175 z); R. I. (§ 143); Wis. (§ 1680 i).

Bank of Morganton v. Hay, 143 N. C. 326, 55 S. E. 811.

⁸⁵ *Pillans v. Van Mierof*, 3 Burrows, 1669.

The promise to accept must be unconditional.⁸⁶ A written promise to pay a draft "for stock" is not conditional,⁸⁷ nor is a promise to accept "on the terms you propose;"⁸⁸ but a promise to accept drafts against "particularly described shipments" is conditional,⁸⁹ and so is a promise to accept an order if the order is not revoked.⁹⁰

To operate as an acceptance, the promise to accept a bill must describe the bill sufficiently for identification,⁹¹ and one who promises in advance to accept a bill of exchange is bound upon such promise only in case the bill in its terms conforms to the terms of his offer.⁹² Thus, a telegraphic offer to accept and pay a draft of \$2,000 is not an acceptance of a draft for that amount "with exchange on New York."⁹³

⁸⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 135); Ariz. (§ 3438); Ill. (§ 134); Kan. (§ 142); Md. (§ 154); Mich. (§ 137); Neb. (§ 134); N. Y. (§ 223); Ohio (§ 3175 z); R. I. (§ 143); Wis. (§ 1680 j).

⁸⁷ *Coffman v. Campbell*, 87 Ill. 98.

⁸⁸ *Parker v. Greele*, 2 Wend. (N. Y.) 545.

⁸⁹ *Germania Nat. Bank v. Taaks*, 101 N. Y. 442, 5 N. E. 76.

⁹⁰ *Shaver v. W. U. Tel. Co.*, 57 N. Y. 459.

⁹¹ *Ulster County Bank v. McFarlan*, 3 Denio (N. Y.) 553; *First Nat. Bank v. Clark*, 61 Md. 400, 48 Am. Rep. 114; *Boyce v. Edwards*, 29 U. S. (4 Pet.) 111, 7 Law. Ed. 22.

⁹² *Lindley v. First Nat. Bank*, 76 Iowa, 629, 41 N. W. 381, 14 Am. St. Rep. 254, 2 L. R. A. 709; *Brinkman v. Hunter*, 73 Mo. 172, 39 Am. Rep. 492; *Ulster County Bank v. McFarlan*, 5 Hill (N. Y.) 432; *Gates v. Parker*, 43 Me. 544; *Murdock v. Mills*, 52 Mass. (1 Metc.) 5.

⁹³ *Lindley v. First Nat. Bank*, 76 Iowa, 629, 41 N. W. 381, 14 Am. St. Rep. 254, 2 L. R. A. 709.

CHAPTER IX.

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

- § 114. When Permissible.
- § 115. How Made.
- § 116. Construction of.
- § 117. Liability of Acceptor.
- § 118. Parties Liable to.
- § 119. Maturity of Bill Payable After Sight.

WHEN PERMISSIBLE.

- § 114. Any person not already liable on a protested bill of exchange may, before its maturity and with the consent of the holder, accept the bill, wholly or partially, for the honor of any person for whose account the bill is drawn.**

Where a bill of exchange has been protested for dishonor by nonacceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn.¹ The acceptance for honor may be for part only of the sum for which the bill is drawn; and, where there has been an acceptance for honor for one party, there may be a further acceptance by a

¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 161); Ariz. (§ 3464); Ill. (§ 160); Kan. (§ 168); Md. (§ 180); Mich. (§ 163); Neb. (§ 160); N. Y. (§ 280); Ohio (§ 3176 y); R. I. (§ 169); Wis. (§ 1681-18).

The word "for" between the words "person" and "whose" was omitted from the original draft of the law as adopted in New York, but was supplied by amendment. Laws 1898, c. 336, § 28.

different person for the honor of another party.² An acceptance for honor may be made at the instance of and under the guaranty of the drawee.³

HOW MADE.

§ 115. An acceptance for honor must be in writing, and signed by the acceptor, and indicate its character.

An acceptance for honor *supra* protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.⁴ The acceptor should be particular to state for whose honor he accepts.⁵

CONSTRUCTION OF.

§ 116. Unless such intent is expressly negatived, the acceptance is deemed for the honor of the drawer.

Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.⁶

LIABILITY OF ACCEPTOR.

§ 117. The acceptor for honor by acceptance engages that he will on due presentment pay the bill according to the terms of

² Same sections of negotiable instruments laws as last above cited.

³ *Konig v. Bayard*, 26 U. S. (1 Pet.) 250, 7 Law. Ed. 558.

⁴ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 162); Ariz. (§ 3465); Ill. (§ 161); Kan. (§ 169); Md. (§ 181); Mich. (§ 164); Neb. (§ 161); N. Y. (§ 281); Ohio (§ 3176z); R. I. (§ 170); Wis. (§ 1681-19).

⁵ 1 *Daniel's Negotiable Inst.* (5th Ed.) p. 520, § 523.

⁶ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 163); Ariz. (§ 3466); Ill. (§ 162); Kan. (§ 170); Md. (§ 182); Mich. (§ 165); Neb. (§ 162); N. Y. (§ 282); Ohio (§ 3177); R. I. (§ 171); Wis. (§ 1681-20).

the acceptance, provided it shall not have been paid by the drawee, and provided, also, that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given him.

The above is practically the language of the negotiable instruments laws which read as follows: "The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided, also, that it shall have been duly presented for payment and protested for nonpayment, and notice of dishonor given to him."⁷ It will thus be seen that the liability of an acceptor for honor is conditional and more analogous to that of an indorser than of an ordinary acceptor.

§ 118. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Under the express provisions of the negotiable instruments laws, the acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted,⁸ and upon payment may be relegated to the rights of the party for whose honor he accepts as against prior parties.⁹

⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 165); Ariz. (§ 3468); Ill. (§ 164); Kan. (§ 172); Md. (§ 184); Mich. (§ 167); Neb. (§ 164); N. Y. (§ 284); Ohio (§ 3177 b); R. I. (§ 173); Wis. (§ 1681-22).

⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 164); Ariz. (§ 3467); Ill. (§ 163); Kan. (§ 171); Md. (§ 183); Mich. (§ 166); Neb. (§ 163); N. Y. (§ 283); Ohio (§ 3177 a); R. I. (§ 172); Wis. (§ 1681-21).

⁹ Acceptor of honor of first indorser may require the holder to indorse the bill to such acceptor. *Freeman v. Perot*, Fed. Cas. No. 5,087.

MATURITY OF BILL PAYABLE AFTER SIGHT.

§ 119. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for nonpayment.

Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for nonacceptance, and not from the date of the acceptance for honor.¹⁰

¹⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 166); Ariz. (§ 3469); Ill. (§ 165); Kan. (§ 173); Md. (§ 185); Mich. (§ 168); Neb. (§ 165); N. Y. (§ 285); Ohio (§ 3177 c); R. I. (§ 174); Wis. (§ 1681-23).

CHAPTER X.

INDORSEMENT AND TRANSFER.

- § 120. "Negotiability" and "Assignability" Distinguished.
- § 121. Effect of Distinction on Rights of Parties.
 - 1. Notice to Debtor.
 - 2. Equities and Defenses Available.
 - 3. Suit in Name of Transferee.
 - 4. Presumption of Consideration.
- § 122. What Constitutes Negotiation.
 - 1. Bearer Paper.
 - 2. Order Paper.
- § 123. Transfer, Without Indorsement, of Order Paper.
- § 124. Negotiation by Delivery.
- § 125. Negotiation by Indorsement—Requisites.
 - 1. Where Written.
 - 2. Consideration.
 - 3. Delivery.
 - 4. Must Be of Entire Instrument.
- § 126. Wording of Indorsement.
- § 127. Name or Designation of Payee or Indorsee Erroneous
- § 128. Kinds of Indorsement.
- § 129. Special Indorsements.
 - Instruments Payable to Bearer Specially Indorsed.
- § 130. Blank Indorsement Made Special.
- § 131. Blank Indorsement.
- § 132. Restrictive Indorsements.
- § 133. Rights of Restrictive Indorsee.
- § 134. Rights of Subsequent Indorsees.
- § 135. Qualified Indorsements.
- § 136. Conditional Indorsements.
- § 137. Indorsements—By Whom Made.
- § 138. Corporation or Infant.
- § 139. Joint Payees.
- § 140. By Agent.
- § 141. Indorsement in Representative Capacity.
- § 142. By Fiscal Officer.
- § 143. Date of Indorsement.

- § 144. Presumption.
- § 145. Place of Indorsement.
- § 146. Negotiation of Bills Drawn in Sets.
- § 147. Striking Out Indorsements.
- § 148. Termination of Negotiability.
- § 149. Reissuance and Renegotiation.

DISTINCTION BETWEEN "NEGOTIABILITY" AND "ASSIGNABILITY."

§ 120. Generally speaking, all contracts are assignable; only those are negotiable, however, which conform to the requirements of this act.

The first great difference between these terms is one of scope, the term "assignability" being much the broader term. Generally speaking, any contract, whether executory¹ or executed,² is assignable, if it is not of a purely personal nature,³ and is not based on personal trust and confidence;⁴ but the only contracts that are negotiable are those complying with the requirements of the negotiable instruments act.⁵

§ 121. The distinction between "negotiability" and "assignability" is largely important as it affects the rights of the parties in the following particulars:

1. Necessity of notice to debtor;
2. Equities and defenses available between the parties;

¹ *La Rue v. Groezinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179; *Macomber v. Parker*, 31 Mass. (14 Pick.) 497; *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N. Y. 209, 31 N. E. 1018.

² *Byar's Garnishees v. Griffin*, 31 Miss. 603; *Smith v. Hubbard*, 85 Tenn. 306, 2 S. W. 569.

³ *Wheeler v. Whann Co.*, 64 Fed. 664; *Fitch v. Brockmon*, 3 Cal. 348; *Edison v. Babka*, 111 Mich. 235, 69 N. W. 499; *Nixon v. Zuricalday*, 2 Misc. 541, 24 N. Y. Supp. 121.

⁴ *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 Law. Ed. 246. But see *Rice v. Gibbs*, 33 Neb. 460, 50 N. W. 436; *Jenkins v. Columbia Land & Imp. Co.*, 13 Wash. 502, 43 Pac. 328.

⁵ See ante, chapter IV, Essentials of Negotiability.

3. **The right of the transferee to sue on the instrument in his own name;**
4. **Presumption of consideration.**

Notice to debtor.

Another distinguishing feature is found in the fact that a complete binding transfer of a negotiable instrument may take place without notice to the debtor; while a transfer of a non-negotiable chose in action is ineffectual as against the debtor without notice to him.⁶

Equities and defenses available.

Furthermore, an assignee of a non-negotiable chose in action acquires only the title and rights of his assignor,⁷ and takes at least subject to all equities and defenses available between the original parties, and in many jurisdictions to all equities and defenses;⁸ while a bona fide transferee of a negotiable instrument may acquire a better title than that of his transferor,⁹ and takes

⁶ *Adams v. Leavens*, 20 Conn. 73; *Merchants' & Mechanics' Bank v. Hewitt*, 3 Iowa, 93, 66 Am. Dec. 49; *Robinson v. Marshall*, 11 Md. 251; *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134. The weight of authority, however, seems to be to the contrary. See *Jones v. Lowery Banking Co.*, 104 Ala. 252, 16 So. 11; *Thayer v. Daniels*, 113 Mass. 129; *Allyn v. Allyn*, 154 Mass. 570, 28 N. E. 779; *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113; *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922; *Richardson v. Ainsworth*, 20 How. Prac. 521; *Callanan v. Edwards*, 32 N. Y. 483.

⁷ *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Jack v. Davis*, 29 Ga. 219; *Shufeldt v. Gillilan*, 124 Ill. 460, 16 N. E. 879; *Wagner v. Winter*, 122 Ind. 57, 23 N. E. 754; *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Mulligan v. Smith*, 13 Colo. App. 231, 57 Pac. 731; *Seligman v. Ten Eyck's Estate*, 49 Mich. 104, 13 N. W. 377.

⁸ *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331; *Stewart v. Wilson*, 35 Ky. (5 Dana) 50; *Hampson v. Owens*, 55 Md. 583; *Ayres v. Campbell*, 9 Iowa, 213, 74 Am. Dec. 346; *Blydenburgh v. Thayer*, 1 Abb. Dec. (N. Y.) 156, 34 How. Prac. 88.

⁹ *United States v. Read*, 2 Cranch, C. C. 159, Fed. Cas. No. 16,125; *Sinclair v. Piercy*, 28 Ky. (5 J. J. Marsh) 63; *Wheeler v. Guild*, 37 Mass. (20 Pick.) 545, 32 Am. Dec. 231; *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331.

free from all prior equities and defenses,¹⁰ except such defenses as forgery¹¹ and want of capacity in the maker or drawer,¹² which go to the very essence of the contract. The rights of bona fide holders are considered later in a subsequent chapter.

Suit in name of transferee.

Closely related to the last-named distinction is another which existed when an assignee of a non-negotiable chose in action could not sue at law in his own name, but could sue only in the name of his assignor.¹³ This rule has long since been abolished, and now an assignee of a non-negotiable, as well as the transferee of a negotiable, instrument, may sue at law or in equity in his own name.¹⁴ The negotiable instruments laws give this right to the "holder,"¹⁵ who is defined to be "the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof."¹⁶ As

¹⁰ See post, § 167.

¹¹ *Mersman v. Werges*, 3 Fed. 378; *Camp v. Carpenter*, 52 Mich. 375, 18 N. W. 113; *Butler v. Carns*, 37 Wis. 61.

See, also, post, § 167.

¹² See post, § 167.

¹³ *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *Leighton v. Preston*, 9 Gill. (Md.) 201; *Amherst Academy v. Cowls*, 23 Mass. (6 Pick.) 427, 17 Am. Dec. 387.

¹⁴ *Fuller v. Arnold*, 98 Cal. 522; *Young v. Kelly*, 3 App. D. C. 296; *City of Carlyle v. Carlyle W., L. & P. Co.*, 140 Ill. 445, 29 N. E. 556. At the common law a chose in action could not be transferred or assigned so that the transferee or assignee could maintain an action thereon in his own name. By the law merchant or the custom of merchants, however, bills of exchange could be transferred or assigned, and the assignee could sue the drawer or acceptor in his own name. *Oakdale Mfg. Co. v. Clarke* [R. I.] 69 Atl. 681.

¹⁵ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 51); Ariz. (§ 3354); Ill. (§ 51); Kan. (§ 58); Md. (§ 70); Mich. (§ 53); Neb. (§ 51); N. Y. (§ 90); Ohio (§ 3172 w); R. I. (§ 59); Wis. (§ 1676-21).

Smith v. Bayer, 46 Or. 143, 79 Pac. 497, 114 Am. St. Rep. 858. Under the negotiable instruments laws, the right to sue includes the right to interpose a set-off or counterclaim.

¹⁶ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or.,

was said in a well considered case on this point: "Any one in possession of a note indorsed in blank is *prima facie* the holder, and may sue upon it, until his right is disproved. It is no defense to an action on such paper that the property in it is in another, and not in plaintiff. All that is required of the plaintiff, in the first instance, is to present the note; its possession being *prima facie* evidence of his ownership of the note and his right to sue. It is only after the defendant has adduced evidence that the note was obtained by undue means, such as fraud, duress, theft, or the like, that the plaintiff is called upon to offer other facts in support of his title."¹⁷

Presumption of consideration.

The last important distinction between the terms "negotiability" and "assignability" is that a consideration for a negotiable instrument is presumed; while the consideration of a non-negotiable instrument must be proved.¹⁸

WHAT CONSTITUTES NEGOTIATION.

§ 122. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof:

1. If payable to bearer it is negotiated by delivery;
2. If payable to order it is negotiated by the indorsement of the holder completed by delivery.

§ 123. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor.

Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 191); Ariz. (§ 3487); Ill. (§ 190); Kan. (§ 2); Md. (§ 14); Mich. (§ 2); Neb. (§ 189); N. Y. (§ 2); Ohio (§ 3178); R. I. (§ 2); Wis. (§ 1675).

¹⁷ *Mumford v. Weaver*, 18 R. I. 801, 31 Atl. 1.

¹⁸ See ante, chapter V, Consideration.

What constitutes negotiation—Indorsement or delivery.

An instrument is said to be negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof.¹⁹ "Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.²⁰ Following this definition, and the common law, though instruments payable to bearer²¹ and those payable to order²² are each negotiable, the former are negotiated by delivery,²³ while the latter are negotiated by indorsement of the holder completed by delivery.²⁴

Transfer, without indorsement, of instrument payable to order.

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition the right to have the indorsement of

¹⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 30); Ariz. (§ 3333); Ill. (§ 30); Kan. (§ 37); Md. (§ 49); Mich. (§ 32); Neb. (§ 30); N. Y. (§ 60); Ohio (§ 3172 b); R. I. (§ 38); Wis. (§ 1676).

²⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 191); Ariz. (§ 3487); Ill. (§ 190); Kan. (§ 2); Md. (§ 14); Mich. (§ 2); Neb. (§ 189); N. Y. (§ 2); Ohio (§ 3178); R. I. (§ 2); Wis. (§ 1675).

²¹ See ante, § 51.

²² See ante, § 50.

²³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 30); Ariz. (§ 3333); Ill. (§ 30); Kan. (§ 37); Md. (§ 49); Mich. (§ 32); Neb. (§ 30); N. Y. (§ 60); Ohio (§ 3172 b); R. I. (§ 38); Wis. (§ 1676).

Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269.

²⁴ Same sections of negotiable instruments laws as last above cited. A check payable to the order of the payee and not indorsed by him is not negotiable. *Hellerman v. Schantz*, 112 N. Y. Supp. 1094; *Sublette v. Brewington* (Mo. App.) 122 S. W. 1150. Delivery essential, see post, § 125; what constitutes, presumption, etc., see ante, chapter III.

the transferror.²⁵ A transferee under such a transfer takes subject to existing equities.²⁶ But in order to determine whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.²⁷ Where the indorsement was omitted by mistake, or there was an agreement to indorse, made at the time of the transfer, the indorsement, when made, relates back to the time of the transfer.²⁸

BY DELIVERY.

§ 124. "Delivery" means transfer of possession, actual or constructive, from one person to another.

As has been stated, every contract on a negotiable instrument is incomplete and irrevocable until the delivery of the instrument

²⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 49); Ariz. (§ 3352); Ill. (§ 49); Kan. (§ 56); Md. (§ 68); Mich. (§ 51); Neb. (§ 49); N. Y. (§ 79); Ohio (§ 3172 v); R. I. (§ 57); Wis. (§ 1676-19).

Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83.

A transferee by delivery without indorsement takes only an equitable interest. Freeman v. Perry, 22 Conn. 617; Pavey v. Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716; Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696.

There is an implied warranty that an instrument has not been paid on a sale thereof for its face value. French v. Turner, 15 Ind. 59; Daskam v. Ullman, 74 Wis. 474, 43 N. W. 321. See, also, Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994.

See, also, Whistler v. Forster, 14 C. B. (N. S.) 248, Bigelow Lead. Cas. 73.

²⁶ Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83; Id., 42 Misc. 341, 86 N. Y. Supp. 701; Terry v. Allis, 16 Wis. 504; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180, 16 Am. St. Rep. 765, 7 L. R. A. 595.

²⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 49); Ariz. (§ 3352); Ill. (§ 49); Kan. (§ 56); Md. (§ 68); Mich. (§ 51); Neb. (§ 49); N. Y. (§ 79); Ohio (§ 3172 v); R. I. (§ 57); Wis. (§ 1676-19).

²⁸ Negotiable Inst. Laws Wis. (§ 1676-19).

This provision is not found in the negotiable instruments laws as

for the purpose of giving effect thereto.²⁹ The negotiable instruments laws define "delivery" to mean the "transfer of possession, actual or constructive, from one person to another."³⁰ This definition must be construed so as to embody the rule just stated. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be;³¹ and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument.³² But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed.³³ And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is shown.³⁴

adopted in the other states, but the rule stated would probably be enforced.

²⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 16); Ariz. (§ 3319); Ill. (§ 16); Kan. (§ 23); Md. (§ 35); Mich. (§ 18); Neb. (§ 16); N. Y. (§ 35); Ohio (§ 3171 o); R. I. (§ 24); Wis. (§ 1675-16).

See ante, chapter III, § 27.

³⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 191); Ariz. (§ 3487); Ill. (§ 190); Kan. (§ 2); Md. (§ 14); Mich. (§ 2); Neb. (§ 189); N. Y. (§ 2); Ohio (§ 3178); R. I. (§ 2); Wis. (§ 1675).

³¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 16); Ariz. (§ 3319); Ill. (§ 16); Kan. (§ 23); Md. (§ 35); Mich. (§ 18); Neb. (§ 16); N. Y. (§ 35); Ohio (§ 3171 o); R. I. (§ 24); Wis. (§ 1675-16).

³² Same sections of negotiable instruments laws last above cited.

³³ Same sections negotiable instruments laws last above cited.

³⁴ Same sections negotiable instruments laws last above cited.

BY INDORSEMENT—REQUISITES.

§ 125. To be effectual the indorsement:

1. Must be written on the instrument itself or upon a paper attached thereto;
2. Must be supported by a consideration, though the general rule presuming a consideration applies;
3. Must be completed by delivery;
4. Must be of the entire instrument.

§ 126. The signature of the indorser, without additional words, is a sufficient indorsement.

§ 127. Where the name of the payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Where written.

An indorsement must be written on the instrument itself or on a paper attached thereto.³⁵ An indorsement is usually and properly written on the back of the instrument,³⁶ but, if intended as an indorsement, may be written on any part of the instrument.³⁷ The propriety of an indorsement on an attached paper or "allonge" is well established.³⁸ Stamping an indorsement on the

³⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 31); Ariz. (§ 3334); Ill. (§ 31); Kan. (§ 38); Md. (§ 50); Mich. (§ 33); Neb. (§ 31); N. Y. (§ 61); Ohio (§ 3172 c); R. I. (§ 39); Wis. (§ 1676-1).

It must be in writing. *Third Nat. Bank v. Clark*, 23 Minn. 263.

³⁶ *Marion & M. Gravel Road Co. v. Kessinger*, 66 Ind. 549.

³⁷ *Richards v. Warring*, 39 Barb. (N. Y.) 42; *Haines v. Dubois*, 30 N. J. Law, 259; *Arnot's Adm'r v. Symonds*, 85 Pa. St. 99, 27 Am. Rep. 630; *Shain v. Sullivan*, 106 Cal. 208, 39 Pac. 606.

³⁸ *Fountain v. Bookstaver*, 141 Ill. 461, 31 N. E. 17; *Folger v. Chase*, 35 Mass. (18 Pick.) 63; *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720.

back of the instrument with a rubber stamp is sufficient if made by one having authority and with intent to indorse,³⁹ but such indorsement does not prove itself.⁴⁰

Consideration.

The rule that a consideration for a negotiable instrument is presumed⁴¹ extends to a transfer of the instrument, and a consideration for an indorsement is presumed.⁴² A consideration for an assignment of a negotiable instrument is also presumed.⁴³ Since an antecedent or pre-existing debt constitutes value within the meaning of the negotiable instrument laws,⁴⁴ such a debt is a sufficient consideration for an indorsement or an assignment of a negotiable instrument.⁴⁵

Delivery.

Under the rules of the common law and the negotiable instru-

It is not necessary that it be physically impossible to place the indorsement on the instrument itself in order to sustain one placed on an allonge. *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720.

The indorsement cannot be made on a separate unattached paper. *Traders' Deposit Bank v. Chiles*, 14 Ky. Law Rep. 617. A mortgage not attached to the note is not an allonge. *Doll v. Hollenbeck*, 19 Neb. 639, 28 N. W. 286. But see *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720, where it was held that a recital in a railroad mortgage bond that the railroad company transferred the note and mortgage to a certain person was a sufficient indorsement of the note to such person.

³⁹*Mayers v. McRinnmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879.

⁴⁰*Mayers v. McRinnmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879.

⁴¹See ante, § 59.

⁴²*Gwyn v. Lee*, 1 Md. Ch. 445; *Connerly v. Planters' & Merchants' Ins. Co.*, 66 Ala. 432; *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Owens v. Snell*, 29 Or. 483, 44 Pac. 827. See, further, on question of consideration for indorsement, *Bucklen v. Johnson*, 19 Ind. App. 406, 49 N. E. 612; *Fredrick v. Winans*, 51 Wis. 472, 8 N. W. 301.

⁴³*Grimes v. McAninch*, 9 Ind. 278.

⁴⁴See ante, § 61.

⁴⁵See *Rogers v. Gallagher*, 49 Ill. 182, 95 Am. Dec. 583.

Consideration as affecting bona fide holders, see post, § 167

ments acts, a delivery is essential to complete a transfer by delivery.⁴⁶

Must be of entire instrument.

An indorsement must be of the entire instrument; and one which purports to transfer a part only of the amount payable, or to transfer the instrument to two or more indorsee^s severally, does not operate as a negotiation of the instrument.⁴⁷ The same rule applies to an attempted assignment of part,⁴⁸ but an instru-

⁴⁶ A delivery is necessary to complete a transfer by indorsement. *Spencer v. Carstarphen*, 15 Colo. 445; *Middleton v. Griffith*, 57 N. J. Law, 442, 31 Atl. 405, 51 Am. St. Rep. 617; *Howe v. Ould*, 28 Grat. (Va.) 1; *Clark v. Sigourney*, 17 Conn. 511, where the payee died after having placed his name on the back of the note, but before delivery to the intended transferee, and it was held that there was no indorsement.

Under the definition of "indorsement," as given in the negotiable instruments laws, a delivery is essential to a complete indorsement. Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§§ 191, 16 30); Ariz. (§§ 3487, 3319, 3338); Ill. (§§ 190, 16, 30); Kan. (§§ 2, 23, 37); Md. (§§ 14, 35, 49); Mich. (§§ 189, 18, 32); Neb. (§§ 2, 16, 30); N. Y. (§§ 2, 35, 60); Ohio (§§ 3178, 3171 o, 3172 b); R. I. (§§ 2, 24, 38); Wis. (§§ 1675, 1675-16, 1676).

⁴⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 32); Ariz. (§ 3335); Ill. (§ 32); Kan. (§ 39); Md. (§ 51); Mich. (§ 34); Neb. (§ 32); N. Y. (§ 62); Ohio (§ 3172 d); R. I. (§ 40); Wis. (§ 1676-2).

That an indorsement of part does not pass title, see *Frank v. Kaigler*, 36 Tex. 305; *Bibb v. Skinner*, 5 Ky. (2 Bibb) 57; *Hughes v. Kiddell*, 2 Bay (S. C.) 324.

Heretofore, an indorsement to two persons transferred a half interest to each. *Herring v. Woodhull*, 29 Ill. 92; *Flint v. Flint*, 88 Mass. (6 Allen) 34; 83 Am. Dec. 615.

⁴⁸ *Martin v. Hayes*, 1 Busb. (N. C.) 423; *Lindsay v. Price*, 33 Tex. 280; *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 637. But see *Cole v. Tuck*, 108 Ala. 227, 19 So. 377, where it was held that a payee who indorses for a limited amount cannot be held liable for attorneys' fees in addition to such amount.

ment which has been paid in part may be indorsed as to the residue.⁴⁹

Wording of indorsement.

The signature of the indorser without other words is a sufficient indorsement,⁵⁰ as is such signature coupled with a written guaranty of payment and a waiver of demand and notice, or an indorsement in the following language:⁵¹ "For value received I hereby sell, transfer and assign the within note and the coupons thereto attached without recourse."⁵² Where the name of the payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.⁵³

⁴⁹ Same sections of negotiable instruments laws as last above cited.

See *Barnett v. Spencer*, 4 Blackf. (Ind.) 206; *Bledsoe v. Fisher*, 5 Ky. (2 Bibb) 471.

⁵⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 31); Ariz. (§ 3334); Ill. (§ 31); Kan. (§ 38); Md. (§ 50); Mich. (§ 33); Neb. (§ 31); N. Y. (§ 61); Ohio (§ 3172 c); R. I. (§ 39); Wis. (§ 1676-1).

This signature may be in pencil. *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755; *Closson v. Stearns*, 4 Vt. 11, 23 Am. Dec. 245; *Cooper v. Bailey*, 52 Me. 230.

The characters "1, 2, 8" in pencil form a sufficient indorsement. *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755. See, also, *Finch v. De Forest*, 16 Conn. 445.

⁵¹ *Buck v. Davenport Sav. Bank*, 29 Neb. 407, 45 N. W. 776, 26 Am. St. Rep. 392; *Phelps v. Church*, 65 Mich. 231, 32 N. W. 30.

⁵² *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 107 Am. St. Rep. 1003.

⁵³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 43); Ariz. (§ 3346); Ill. (§ 43); Kan. (§ 50); Md. (§ 62); Mich. (§ 45); Neb. (§ 43); N. Y. (§ 62); Ohio (§ 3172 o); R. I. (§ 51); Wis. (§ 1676-14).

KINDS AND EFFECT OF INDORSEMENTS.

- § 128. An indorsement may be either special, or in blank, and it may also be either restrictive or qualified, or conditional.

SPECIAL.

- § 129. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable, and the indorsement of such indorsee is necessary to the further negotiation of the instrument.

Exception.—Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery.

- § 130. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

An indorsement may be special;⁵⁴ that is, it may specify the person to whom or to whose order the instrument is to be payable.⁵⁵ A special indorsement, as thus defined, is the same as what is commonly called an indorsement in full.⁵⁶ The indorse-

⁵⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 33); Ariz. (§ 3336); Ill. (§ 33); Kan. (§ 40); Md. (§ 52); Mich. (§ 35); Neb. (§ 33); N. Y. (§ 63); Ohio (§ 3172 e); R. I. (§ 41); Wis. (§ 1676-3).

⁵⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 34); Ariz. (§ 3337); Ill. (§ 34); Kan. (§ 41); Md. (§ 53); Mich. (§ 36); Neb. (§ 34); N. Y. (§ 64); Ohio (§ 3172 b); R. I. (§ 42); Wis. (§ 1676-4).

As to what is a special indorsement, see *Rice v. Stearns*, 3 Mass. 225, 3 Am. Dec. 129; *Reamer v. Bell*, 79 Pa. St. 292.

⁵⁶ *Kilpatrick v. Heaton*, 3 Brev. (S. C.) 92.

ment of the person to whom the instrument is specially indorsed is necessary to the further negotiation of the paper.⁵⁷

Instruments payable to bearer, specially indorsed, pass by delivery.

Where an instrument payable to bearer is specially indorsed, it may nevertheless be negotiated by delivery.⁵⁸ By expressly limiting the rule to instruments payable to bearer, the negotiable instruments act changes the rule existing in some jurisdictions, that where the first indorsement is in blank, the instrument is transferable by delivery, though there is a subsequent special or full indorsement.⁵⁹ The person so specially indorsing is liable as indorser to such holders only as make title through his indorsement.⁶⁰

Blank indorsement made special.

Under the negotiable instruments laws the holder may convert

⁵⁷ Same sections of negotiable instruments laws as last above cited. *Grimes v. Piersol*, 25 Ind. 246.

⁵⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 40); Ariz. (§ 3343); Ill. (§ 40); Kan. (§ 47); Md. (§ 59); Mich. (§ 42); Neb. (§ 40); N. Y. (§ 70); Ohio (§ 31721); R. I. (§ 48); Wis. (§ 1676-10).

Such is the rule of the law merchant. *Habersham v. Lehman*, 63 Ga. 380; *Johnson v. Mitchell*, 50 Tex. 212, 32 Am. Rep. 602; *Watervliet Bank v. White*, 1 Denio (N. Y.) 608; *Mitchell v. Fuller*, 15 Pa. St. 268, 53 Am. Dec. 594.

A check payable to a certain named person or bearer need not be indorsed. *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817.

⁵⁹ *Mitchell v. Fuller*, 15 Pa. St. 268, 53 Am. Dec. 594; *Watervliet Bank v. White*, 1 Denio (N. Y.) 608; *Habersham v. Lehman*, 63 Ga. 380.

See Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 9); Ariz. (§ 3312); Ill. (§ 9); Kan. (§ 16); Md. (§ 28); Mich. (§ 11); Neb. (§ 9); N. Y. (§ 28); Ohio (§ 3171 b); R. I. (§ 17); Wis. (§ 1675-9).

⁶⁰ Same sections of negotiable instruments laws as last above cited.

a blank indorsement into a special or full indorsement by writing over the signature of the indorser any contract consistent with the character of the indorsement.⁶¹ This rule authorizes the holder to fill up a blank indorsement with a special indorsement to himself,⁶² and is applicable to an indorsement in blank without recourse.⁶³ It does not, however, authorize the holder to insert over the signature of the indorser, without his knowledge or consent, a special contract of guaranty.⁶⁴ Nor does it authorize the holder to write in a consideration for the indorsement,⁶⁵ or a waiver of demand and notice,⁶⁶ or anything that will change the relation of the parties,⁶⁷ or the nature of the indorsement.⁶⁸

IN BLANK.

§ 131. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

⁶¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 35); Ariz. (§ 3338); Ill. (§ 35); Kan. (§ 42); Md. (§ 54); Mich. (§ 37); Neb. (§ 35); N. Y. (§ 65); Ohio (§ 3172 g); R. I. (§ 43); Wis. (§ 1676-5).

As to right of holder to fill blank indorsement, see *Condon v. Pearce*, 43 Md. 83.

⁶² *Lucas v. Byrne*, 35 Md. 485; *Lyon v. Ewings*, 17 Wis. 63; *Metcalf v. Yeaton*, 51 Me. 198; *Illinois Conference v. Plagge*, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252.

⁶³ *Lyon v. Ewings*, 17 Wis. 63. But see *Catlin v. Jones*, 1 Pin. (Wis.) 130.

⁶⁴ *Belden v. Hann*, 61 Iowa, 42, 15 N. W. 591, where the guarantee was held to be void, and the indorser still entitled to notice of dishonor and protest.

⁶⁵ *Hood v. Robbins*, 98 Ala. 484, 13 So. 574.

⁶⁶ *Catlin v. Jones*, 1 Pin. (Wis.) 130; *Kimbro v. Lamb*, 23 Tenn. (4 Humph.) 95, 40 Am. Dec. 628.

⁶⁷ *Comparree v. Brockway*, 30 Tenn. (11 Humph.) 355; *Morrison v. Smith*, 13 Mo. 234, 53 Am. Dec. 145.

⁶⁸ *Christian County Bank v. Goode*, 44 Mo. App. 129.

Blank indorsement—Title passes by delivery.

An indorsement may be in blank;⁶⁹ that is, it need not specify an indorsee.⁷⁰ Instruments so indorsed are payable to bearer and pass by delivery.⁷¹ The legal effect of a blank indorsement cannot be varied by evidence of parol, contemporaneous agreements.⁷²

RESTRICTIVE—FORM.**§ 132. An indorsement is restrictive which either:**

1. Prohibits the further negotiation of the instrument;
But the mere absence of words implying power to negotiate does not make an indorsement restrictive;
2. Constitutes the indorsee the agent of the indorser;
3. Vests the title in the indorsee in trust for or to the use of some other person.

Restrictive indorsement—Preventing further negotiation.

An indorsement may also be restrictive.⁷³ It is restrictive if it

⁶⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 33); Ariz. (§ 3336); Ill. (§ 33); Kan. (§ 40); Md. (§ 52); Mich. (§ 35); Neb. (§ 33); N. Y. (§ 63); Ohio (§ 3172 e); R. I. (§ 41); Wis. (§ 1676-3).

⁷⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 34); Ariz. (§ 3337); Ill. (§ 34); Kan. (§ 41); Md. (§ 53); Mich. (§ 36); Neb. (§ 34); N. Y. (§ 64); Ohio (§ 3172 b); R. I. (§ 42); Wis. (§ 1676-4).

Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269.

⁷¹ Same sections of negotiable instruments laws as last above cited.

Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269.

⁷² Torbert v. Montague, 38 Colo. 325, 87 Pac. 1145. Parol evidence is not admissible to show that one who indorsed in blank was not to be liable as indorser. Charles v. Denis, 42 Wis. 56, 24 Am. Rep. 383.

⁷³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 33); Ariz. (§ 3336); Ill. (§ 33); Kan. (§ 40); Md. (§ 52); Mich. (§ 35); Neb. (§ 33); N. Y. (§ 63); Ohio (§ 3172 e); R. I. (§ 41); Wis. (§ 1676-3).

prevents further negotiation of the instrument.⁷⁴ Thus, an indorsement to a named person "only" is restrictive,⁷⁵ and so is one to pay the money for any particular purpose.⁷⁶ But the mere absence of the words "order" or "bearer," or other words implying power to negotiate, does not make an indorsement restrictive.⁷⁷

Same—Creating agency or trust.

An indorsement is also restrictive if it makes the indorsee the agent of the indorser.⁷⁸ Under this rule fall indorsements for collection,⁷⁹ and it should be remembered, in this connection, that

⁷⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 36); Ariz. (§ 3339); Ill. (§ 36); Kan. (§ 43); Md. (§ 55); Mich. (§ 38); Neb. (§ 36); N. Y. (§ 66); Ohio (§3172b); R. I. (§ 44); Wis. (§ 1676-6).

⁷⁵ *Power v. Finnie*, 4 Call (Va.) 411.

⁷⁶ *White v. National Bank*, 102 U. S. 658, 26 Law. Ed. 250, where the indorsement "Pay to A. or order, for account of B," was held to make A. merely the agent of B. for the collection of the instrument. See, also, *Hook v. Pratt*, 78 N. Y. 371, 34 Am. Rep. 539.

Indorsement for deposit, see *Ditch v. Western Nat. Bank*, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 164; *Johnson v. Donnell*, 90 N. Y. 1; *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. 160.

Indorsements to "A, or order, for account B," see *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524, 17 So. 728, 54 Am. St. Rep. 5; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Armour Bros. Banking Co. v. Riley County Bank*, 30 Kan. 163, 91 Pac. 506.

⁷⁷ Same sections of negotiable instruments laws as last above cited.

⁷⁸ Subdivision 2 of same sections of negotiable instruments laws as last above cited.

⁷⁹ *Smith v. Bayer*, 46 Or. 143, 79 Pac. 497; *Ward v. Smith*, 74 U. S. (7 Wall.) 447, 19 Law. Ed. 207; *Commercial Bank v. Armstrong*, 148 U. S. 50, 37 Law. Ed. 363; *Clafin v. Wilson*, 51 Iowa, 15, 50 N. W. 578; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 15 Am. St. Rep. 515, 7 L. R. A. 852; *Bowman v. First Nat. Bank*, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870; *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 643; *Blakeslee v. Hewett*, 76 Wis. 341, 44 N. W. 1105; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524, where the effect of canceling a restrictive indorsement for col-

a bank or other agent for collection, on indorsing the instrument, becomes liable in all respects as a general indorser.⁸⁰ An indorsement is also restrictive if it vests the title in the indorsee in trust for, or to the use of, some other person.⁸¹

RESTRICTIVE—RIGHTS OF INDORSEE.

§ 133. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

§ 134. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

Under a restrictive indorsement the indorsee may receive payment of the instrument,⁸² bring any action the indorser could

bring, and placing an absolute indorsement on the paper, is considered.

An unrestricted indorsement, intended for collection, does not render the indorser liable to a subsequent holder under indorsements "for collection." *Freeman's Nat. Bank v. National Tube-Works*, 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42.

Where indorsement in blank is accompanied by a letter stating that the draft is for "collection and credit," the indorsement and letter should be read together, and, so read, render the indorsement restrictive. *Bank of America v. Waydell*, 187 N. Y. 115, 79 N. E. 857, affg. 103 App. Div. 25, 92 N. Y. Supp. 666.

⁸⁰ See post, § 161.

⁸¹ Subdivision 3 of same sections of negotiable instruments laws as last above cited.

Hook v. Pratt, 78 N. Y. 371, 34 Am. Rep. 539, where the indorsement was to "pay to the order of Mrs. Mary Hook * * * for the benefit of her son Charlie."

⁸² Payment to indorsee for collection is good. *King v. Fleece*, 54 Tenn. (7 Heisk.) 273; *Padfield v. Green*, 85 Ill. 529.

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bring,⁸³ and transfer his rights as such indorsee where the form of the indorsement authorizes him to do so.⁸⁴ A restrictive indorsee takes the paper subject to all equities that might have been asserted by the maker if it had not been indorsed,⁸⁵ and all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.⁸⁶

QUALIFIED.

§ 135. A qualified indorsement may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument and constitutes the indorser a mere assignor of the title to the instrument.

Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 37); Ariz. (§ 3340); Ill. (§ 37); Kan. (§ 44); Md. (§ 56); Mich. (§ 59); Neb. (§ 37); N. Y. (§ 67); Ohio (§ 3172 i); R. I. (§ 45); Wis. (§ 1676-7).

⁸³ Subdivision 2 of same sections of negotiable instruments laws as last above cited.

Smith v. Bayer, 46 Or. 143, 79 Pac. 497, 114 Am. St. Rep. 858.

An indorsee for collection may sue in his own name. *McCallum v. Driggs*, 35 Fla. 277; *Wilson v. Tolson*, 79 Ga. 137, 3 S. E. 900; *Moore v. Hall*, 48 Mich. 143, 11 N. W. 844; *Roberts v. Parrish*, 17 Or. 583, 22 Pac. 136; *Cross v. Brown*, 19 R. I. 220, 33 Atl. 147; *King v. Fleece*, 54 Tenn. (7 Heisk.) 273. But see *Black v. Enterprise Ins. Co.*, 33 Ind. 223; *Rock County Nat. Bank v. Hollister*, 21 Minn. 385, where such indorsee was held not to be the "real party in interest." In *Minnesota Thresher Mfg. Co. v. Heipler*, 49 Minn. 395, 52 N. W. 33, it was held that the payee of a draft was the real party in interest, though there was an agreement between him and the drawer that he took it for collection. See, also, *Eaton v. Alger*, 47 N. Y. 345.

⁸⁴ Subdivision 3 of same sections of negotiable instruments laws as last above cited.

See *Brook v. Vannest*, 58 N. J. Law, 162, 33 Atl. 382.

⁸⁵ *Smith v. Bayer*, 46 Or. 143, 79 Pac. 497, 114 Am. St. Rep. 858. Payment to indorser after assignment a defense. *Id.*

⁸⁶ Same subdivisions and sections of negotiable instruments laws as last above cited.

An indorsement may be qualified.⁸⁷ An indorsement "without recourse,"⁸⁸ or in words of similar import,⁸⁹ is qualified. A qualified indorsement makes the indorser a mere assignor of the title to the instrument,⁹⁰ but does not impair its negotiability.⁹¹ In the absence of special contract, the obligations of a transferror of negotiable paper by an indorsement "without recourse" are "substantially the same as those of a transferror of such paper when payable to bearer by delivery merely. It is a clear and well settled doctrine that such a transfer does not make the party liable as indorser. When he indorses 'without recourse' * * * he ceases to be a party to the paper. He cannot be made liable

Leary v. Blanchard, 48 Me. 269.

Rights under indorsement for collection, see *Bank of Metropolis v. First Nat. Bank*, 19 Fed. 301; *Central Railroad v. First Nat. Bank of Lynchburg*, 73 Ga. 383; *Clafin v. Wilson*, 51 Iowa, 15, 50 N. W. 578.

⁸⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 33); Ariz. (§ 3336); Ill. (§ 33); Kan. (§ 40); Md. (§ 52); Mich. (§ 35); Neb. (§ 33); N. Y. (§ 63); Ohio (§ 3172 e); R. I. (§ 41); Wis. (§ 1676-3).

⁸⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 38); Ariz. (§ 3341); Ill. (§ 38); Kan. (§ 45); Md. (§ 57); Mich. (§ 40); Neb. (§ 38); N. Y. (§ 68); Ohio (§ 3172 i); R. I. (§ 46); Wis. (§ 1676-8).

Doom v. Sherwin, 20 Colo. 234, 38 Pac. 56; *Cross v. Hollister*, 47 Kan. 652, 28 Pac. 693; *Johnson v. Williard*, 83 Wis. 420, 53 N. W. 776, 17 L. R. A. 564; *President of Fitchburg Bank v. Greenwood*, 84 Mass. (2 Allen) 434; *Hayden v. Strong*, 23 Hun (N. Y.) 527.

⁸⁹ Same sections of negotiable instruments laws as last above cited.

See *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 62 Am. St. Rep. 698, 36 L. R. A. 117.

⁹⁰ Same sections of negotiable instruments laws as last above cited.

Brotherton v. Street, 124 Ind. 599, 24 N. E. 1068.

⁹¹ Same sections of negotiable instruments laws as last above cited.

Elgin City Banking Co. v. Hall [Tenn.] 108 S. W. 1068; *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847. Indorsement "for value received, I hereby sell, transfer, and assign the within note and the coupons thereto attached without recourse," does not impair negotiable character of instrument. *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 107 Am. St. Rep. 1003.

as a party to or upon the instrument.”⁹² He still remains liable, however, on the implied warranties which accompany a transfer of bearer paper by delivery.⁹³ As between successive indorsers it may be shown by parol to which the words “without recourse” apply.⁹⁴

CONDITIONAL.

§ 136. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

An indorsement may also be conditional.⁹⁵ The person required to pay may disregard the condition, and pay to the indorsee or his transferee, whether the condition has been performed or not.⁹⁶ But any person to whom an instrument so indorsed is negotiated

⁹² *Watson v. Chesire*, 18 Iowa, 202, 87 Am. Dec. 382. See, also, *Rice v. Stearns*, 3 Mass. 225, 3 Am. Dec. 129; *Otis v. Cullum*, 92 U. S. 447, 23 Law. Ed. 496; *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152; *Drennan v. Bunn*, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354; *Palmer v. Courtney*, 32 Neb. 773, 49 N. W. 754.

⁹³ *Watson v. Chesire*, 18 Iowa, 202, 87 Am. Dec. 382.

Indorsement “without recourse” does not avoid warranty of genuineness and title. Code Supp. § 3060-a65. *State v. Corning State Sav. Bank*, 139 Iowa, 388, 115 N. W. 937.

For implied warranties, where negotiation is by delivery or qualified indorsement, see post, § 158.

⁹⁴ *Corbett v. Fetzer*, 47 Neb. 269, 66 N. W. 417.

⁹⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 33); Ariz. (§ 3336); Ill. (§ 33); Kan. (§ 40); Md. (§ 52); Mich. (§ 35); Neb. (§ 33); N. Y. (§ 63); Ohio (§ 3172 e); R. I. (§ 41); Wis. (§ 1676-3).

⁹⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 39); Ariz. (§ 3342); Ill.

will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.⁹⁷

BY WHOM INDORSED.

IN GENERAL.

§ 137. Generally the instrument must be indorsed by the person to whom it is payable or his duly authorized agent.

§ 138. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

In order to pass title to the instrument, the indorsement must be made by one legally interested in the paper; that is, generally, by the payee or his duly authorized agent.⁹⁸ As a general rule executors have no power to bind the estate by contracts of indorsement.⁹⁹

While ordinarily the person transferring the paper must have capacity to contract,¹⁰⁰ still, by the express provisions of the negotiable instruments laws, the indorsement of an infant or corporation passes the property in the instrument, though, from

(§ 39); Kan. (§ 46); Md. (§ 58); Mich. (§ 41); Neb. (§ 39); N. Y. (§ 69); Ohio (§ 3172 k); R. I. (§ 47); Wis. (§ 1676-9).

This changes the old rule as it existed in England. See *Robertson v. Kensington*, 4 Taunt. 30, where the indorsement was to pay C, or order, "upon my name appearing in the Gazette as ensign in any regiment of the line between the 1st and 64th, if within two months from date," and it was held that a payment to a subsequent indorsee was made at the risk of the condition being unfulfilled:

⁹⁷ Same sections of negotiable instruments laws as last above cited.

⁹⁸ Chitty on Bills (13th Ed.) 197.

⁹⁹ *Packard v. Dunfee*, 119 App. Div. 599, 104 N. Y. Supp. 140.

¹⁰⁰ *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Hardy v. Waters*, 38 Me. 450.

want of capacity the infant or corporation could incur no liability thereon.¹⁰¹

JOINT PAYEES.

§ 139. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the other.¹⁰² But title will pass where one of two joint indorsees indorses to the other,¹⁰³ or where one of two joint payees indorses to a stranger, who in turn indorses to the other payee.¹⁰⁴ One partner may indorse for the firm,¹⁰⁵ and all the partners may indorse to one of their number.¹⁰⁶

¹⁰¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 22); Ariz. (§ 3325); Ill. (§ 22); Kan. (§ 29); Md. (§ 41); Mich. (§ 24); Neb. (§ 22); N. Y. (§ 41); Ohio (§ 3171 v); R. I. (§ 30); Wis. (§ 1675-22).

¹⁰² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 41); Ariz. (§ 3344); Ill. (§ 41); Kan. (§ 48); Md. (§ 60); Mich. (§ 43); Neb. (§ 41); N. Y. (§ 71); Ohio (§ 3172 m); R. I. (§ 49); Wis. (§ 1676-11).

Allen v. Corn Exchange Bank, 87 App. Div. 335, 84 N. Y. Supp. 1001; Rhyner v. Feickert, 92 Ill. 305, 34 Am. Rep. 130; Foster v. Hill, 36 N. H. 526. Under this section, indorsement of all payees necessary to give good title to the transferee. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445.

¹⁰³ Logue v. Smith, Wright (Ohio) 10.

¹⁰⁴ See McLeod v. Snyder, 110 Mo. 298, 19 S. W. 494.

¹⁰⁵ Childress v. Emory, 21 U. S. (8 Wheat.) 642, 5 Law. Ed. 530.

¹⁰⁶ Merrill v. Guthrie, 1 Pin. (Wis.) 435; Manegold v. Dulau, 30 Wis. 541.

BY AGENT.

§ 140. An indorsement may be made by a duly authorized agent.

§ 141. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

Indorsement by agent or in representative capacity.

An indorsement may be made by an agent,¹⁰⁷ and the authority of the agent may be in writing or by parol.¹⁰⁸ While this authority may be implied, still it must ordinarily be expressly conferred.¹⁰⁹ An authority to indorse, given by the payee of an order while competent, may be exercised by the person to whom it was given, after the payee has become incompetent.¹¹⁰ Lawful possession of a negotiable instrument,¹¹¹ or possession with authority to collect,¹¹² confers a right to indorse. An unauthorized indorsement may be ratified,¹¹³ either by a failure to repudiate the indorsement after full knowledge of the facts,¹¹⁴ or by receiving

¹⁰⁷ *Northampton Bank v. Pepoon*, 11 Mass. 288; *Fountain v. Bookstaver*, 141 Ill. 461, 31 N. E. 17; *Bettis v. Bristol*, 56 Iowa, 41, 8 N. W. 808. Banks authorized to deal in commercial paper are bound by its indorsement or guaranty by their executive officers. *State v. Corning State Sav. Bank*, 139 Iowa, 338, 115 N. W. 937.

¹⁰⁸ *Fountain v. Bookstaver*, 141 Ill. 461, 31 N. E. 17; *Bettis v. Bristol*, 56 Iowa, 41, 8 N. W. 808; *Cooper v. Bailey*, 52 Me. 230. See, also, *Second Nat. Bank v. Martin*, 82 Iowa, 442, 48 N. W. 735; *First Nat. Bank v. Loyhed*, 28 Minn. 396, 10 N. W. 421. Authority of corporate officer to indorse paper payable to the corporation may be implied from previous conduct and custom. *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88. Telegraphed authority "to indorse," what might be termed a renewal note, held to include authority to waive demand, etc., the indorsement on the first note containing such a waiver. *State Bank & Trust Co. of Los Angeles v. Evans*, 198 Mass. 11, 84 N. E. 329.

¹⁰⁹ *Bank of Morganton v. Hay*, 143 N. C. 326, 55 S. E. 811.

¹¹⁰ *Mills v. American Express Co.*, 98 Mich. 154, 57 N. W. 97.

¹¹¹ *Andrews v. Bond*, 16 Barb. (N. Y.) 633.

¹¹² *Willison v. Smith*, 52 Mo. App. 133.

¹¹³ *Lysle v. Beals*, 27 La. Ann. 274.

¹¹⁴ *Mayer v. Old*, 57 Mo. App. 639.

the proceeds of the instruments; ¹¹⁵ but a mere acquiescence in an unauthorized sale of a note given to an agent for collection, without knowledge of the wrongful indorsement, does not amount to a ratification.¹¹⁶ Where an instrument is so payable or indorsed that the payee or indorsee is under obligation to indorse in a representative capacity, he may indorse in such terms as will negative personal liability.¹¹⁷

BY FISCAL OFFICER.

§ 142. Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to such bank or corporation, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of such officer,¹¹⁸ and, as against a bona

¹¹⁵ Third Nat. Bank v. Butler Colliery Co., 59 Hun, 627, 14 N. Y. Supp. 21. But see Claffin v. Wilson, 51 Iowa, 15, 50 N. W. 578.

¹¹⁶ Sherrill v. Weisiger Clothing Co., 114 N. C. 436, 19 S. E. 365.

¹¹⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 44); Ariz. (§ 3347); Ill. (§ 44); Kan. (§ 51); Md. (§ 63); Mich. (§ 46); Neb. (§ 44); N. Y. (§ 74); Ohio (§ 3172 p); R. I. (§ 52); Wis. (§ 1676-14).

Davis v. Peck, 54 Barb. (N. Y.) 425.

Descriptio personae in indorsement, see Speelman v. Culbertson, 15 Ind. 441; Powell v. Morrison, 35 Mo. 244.

A bank is bound by an indorsement, "Pay to order of A. J. A. Marine Bank by J. S. H., Pres't." Aiken v. Marine Bank, 16 Wis. 713. And a bank of which A. B. is cashier is bound by an indorsement, "A. B., Cas." Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107.

¹¹⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 42); Ariz. (§ 3345); Ill.

fide purchaser, it would seem that this presumption is conclusive.¹¹⁹ This rule enlarges the previously existing rule that paper payable or indorsed to a cashier is payable to the bank,¹²⁰ by making paper payable or indorsed to "other fiscal officers" payable to the bank, and is undoubtedly based on the theory that the employment of the qualifying word "cashier," or other designation of a fiscal office, appended to the name of a payee or indorsee of commercial paper, creates an ambiguity as to the real party intended, to explain which parol evidence is admissible to show who is the principal for whose benefit such agent received or accepted the promise to pay a stipulated sum of money.¹²¹ Where, however, no official designation is added to the payee or indorsee's name, there being no uncertainty apparent from an inspection of the paper, parol evidence is inadmissible to control or vary the terms of the writer.¹²² An indorsement of the name of a corporation, made by a duly authorized officer, is the indorsement of the corporation, though the agency does not appear.¹²³

(§ 42); Kan. (§ 49); Md. (§ 61); Mich. (§ 44); Neb. (§ 42); N. Y. (§ 72); Ohio (§ 3172 m); R. I. (§ 50); Wis. (§ 1676-12).

Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13.

¹¹⁹ Held incompetent for bank to show that cashier was acting for own interest. Johnson v. Buffalo Center State Bank, 134 Iowa, 731, 112 N. W. 165.

¹²⁰ Watervliet Bank v. White, 1 Denio (N. Y.) 608; First Nat. Bank v. Hall, 44 N. Y. 395, 4 Am. Rep. 698; Farmers' & Mechanics' Bank v. Day, 13 Vt. 36. See, also, Dupont v. Mt. Pleasant Ferry Co., 9 Rich. Law (S. C.) 255 (indorsement to president of corporation); Sayers v. First Nat. Bank, 89 Ind. 230 (indorsement to trustee of university).

¹²¹ First Nat. Bank v. McCullough, 50 Or. 508, 93 Pac. 366, 126 Am. St. Rep. 758, 17 L. R. A. (N. S.) 1105. Under this section, in an action on a certificate of deposit payable to S, as cashier of a bank and indorsed by him as cashier, it is competent to show that S was the cashier of the bank and was acting in that capacity in transferring the certificate. Johnson v. Buffalo Center State Bank, 134 Iowa, 731, 112 N. W. 165.

¹²² First Nat. Bank v. McCullough, 50 Or. 508, 93 Pac. 366, 126 Am. St. Rep. 758, 17 L. R. A. (N. S.) 1105.

¹²³ Second Nat. Bank v. Martin, 82 Iowa, 442, 48 N. W. 735.

TIME AND PLACE OF INDORSEMENT.

- § 143. Where an indorsement is dated, such date is deemed *prima facie* correct.
- § 144. Except where an indorsement bears date, after the maturity of an instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.
- § 145. Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

Time of indorsement—Presumptions.

An indorsement being dated, such date is deemed, *prima facie*, the true date thereof.¹²⁴ The indorsement being undated, it is presumed to have been made on the date of execution and delivery of the note.¹²⁵ Every indorsement is deemed *prima facie* to have been affected before the instrument was overdue, except, of course, where the instrument bears date later than the time of maturity of the instrument.¹²⁶

¹²⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 11); Ariz. (§ 3314); Ill. (§ 11); Kan. (§ 18); Md. (§ 30); Mich. (§ 13); Neb. (§ 11); N. Y. (§ 30); Ohio (§ 3171 j); R. I. (§ 19); Wis. (§ 1675-11).

¹²⁵ Rodriguez v. Merriman, 133 Ill. App. 372; Grier v. Cabbie, 45 Ill. App. 405; Way v. Butterworth, 108 Mass. 509; Bradford v. Prescott, 85 Me. 482; Mason v. Noonan, 7 Wis. 510.

In the absence of evidence to the contrary, indorsements are presumed to have been made at or about the date of the note. Rule applied to note payable to the order of the maker. Roach v. Sanborn Land Co., 135 Wis. 354, 115 N. W. 1102.

Variance between pleading and proof as to time of indorsement, see Canfield v. McIlwaine, 32 Md. 94; Little v. Blunt, 33 Mass. (16 Pick.) 359; Davis v. Miller, 14 Grat. (Va.) 1.

¹²⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 45); Ariz. (§ 3348); Ill. (§ 45); Kan. (§ 52); Md. (§ 64); Mich. (§ 47); Neb. (§ 45); N. Y. (§ 75); Ohio (§ 3172 q); R. I. (§ 53); Wis. (§ 1676-15).

Place of indorsement—Presumptions.

Following the common-law rule,¹²⁷ every indorsement is presumed to have been made at the place where the instrument is dated.¹²⁸

NEGOTIATION OF BILLS DRAWN IN SETS.

§ 146. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing herein affects the rights of a person who in due course accepts or pays the part first presented to him.

Ordinarily the indorsement or transfer of one part of a bill drawn in a set is a transfer of the whole set,¹²⁹ but, as between holders in due course of two or more parts of a set, the one whose title first accrues is the owner of the bill.¹³⁰ But this rule does not affect the rights of a person who in due course accepts or pays the part first presented to him.¹³¹

¹²⁷ *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 111 Am. St. Rep. 717, 2 L. R. A. (N. S.) 299, afg. 87 App. Div. 633, 84 N. Y. Supp. 1121.

¹²⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 46); Ariz. (§ 3349); Ill. (§ 46); Kan. (§ 53); Md. (§ 65); Mich. (§ 48); Neb. (§ 46); N. Y. (§ 76); Ohio (§ 3172 r); R. I. (§ 54); Wis. (§ 1676-16).

Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103, 111 Am. St. Rep. 717, 2 L. R. A. (N. S.) 299.

¹²⁹ *Walsh v. Blatchley*, 6 Wis. 413, 422, 70 Am. Dec. 409.

¹³⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 179); Ariz. (§ 3482); Ill. (§ 178); Kan. (§ 186); Md. (§ 198); Mich. (§ 181); Neb. (§ 178); N. Y. (§ 311); Ohio (§ 3177 p); R. I. (§ 187); Wis. (§ 1681-36).

¹³¹ Same sections of negotiable instruments laws as last above cited.

STRIKING OUT INDORSEMENTS.

§ 147. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the indorsement.

It is a general rule that an indorser may strike out his own indorsement if the instrument is returned to him,¹³² or indorsements subsequent to his own if he again becomes the holder.¹³³ The holder may also, at any time, strike out any indorsement which is not necessary to his title,¹³⁴ and in this connection the negotiable instruments laws follow the common-law rule.¹³⁵ An indorser

¹³² Sweet v. Garwood, 88 Ill. 407; Chautauqua County Bank v. Davis, 21 Wend. (N. Y.) 584. See, also, French v. Jarvis, 29 Conn. 347.

¹³³ Giddings v. McCumber, 51 Ill. App. 373; Alcock v. McKain, 12 La. Ann. 614; Ritchie v. Moore, 5 Munf. (Va.) 388, 7 Am. Dec. 688. See, also, Bank of U. S. v. United States, 43 U. S. (2 How.) 711, 11 Law. Ed. 257.

¹³⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 48); Ariz. (§ 3351); Ill. (§ 48); Kan. (§ 55); Md. (§ 67); Mich. (§ 50); Neb. (§ 48); N. Y. (§ 78); Ohio (§ 3172 t); R. I. (§ 56); Wis. (§ 1676-18).

Where note indorsed to bank for collection and after protest is returned to the indorser, the latter may cancel his indorsement to the bank. New Haven Mfg. Co. v. New Haven Pulp & Board Co., 76 Conn. 126, 55 Atl. 604. Where one becomes the holder of a note by delivery under an indorsement in blank by the payee, he is entitled to strike out a subsequent indorsement under which he does not claim title, and it is immaterial whether such indorsement is restrictive or not. Jerman v. Edwards, 29 App. D. C. 535.

A blank indorsement may be struck out at the trial. Parks v. Brown, 16 Ill. 454; Hunter v. Hempstead, 1 Mo. 67, 13 Am. Dec. 468. Especially if such indorsement is not declared on in the petition. Merg v. Kaiser, 20 La. Ann. 377; Hill v. Buddington, 8 Rob. (La.) 119.

But in a suit by a holder against an indorser, plaintiff will not be allowed to strike out the name of any indorser prior to defendant. Curry v. Bank of Mobile, 8 Port. (Ala.) 360.

¹³⁵ Jerman v. Edward, 29 App. D. C. 535.

whose indorsement is struck out, and all indorsers subsequent to him, are thereby discharged.¹³⁶

TERMINATION OF NEGOTIABILITY.

§ 148. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or has been discharged by payment or otherwise.¹³⁷ This rule applies though the instrument is overdue,¹³⁸ though of course, in such case, the rights and duties of the parties are different, the instrument becoming, so far as the indorser is concerned, in effect payable on demand.¹³⁹

REISSUANCE AND RENEGOTIATION.

§ 149. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions herein, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

If an instrument is negotiated back to a prior party, such party may, subject to the other provisions of the negotiable instruments

¹³⁶ Same sections of negotiable instruments laws as last above cited.

¹³⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 47); Ariz. (§ 3350); Ill. (§ 47); Kan. (§ 54); Md. (§ 66); Mich. (§ 49); Neb. (§ 47); N. Y. (§ 77); Ohio (§ 3172 s); R. I. (§ 55); Wis. (§ 1676-17).

¹³⁸ National Bank of Washington v. Texas, 87 U. S. (20 Wall.) 72, 22 Law. Ed. 295; Moore v. Alexander, 63 App. Div. 100, 71 N. Y. Supp. 420.

Within the meaning of garnishment statute, an overdue promissory note was held "negotiable." Oakdale Mfg. Co. v. Clarke [R. I.] 69 Atl. 681.

¹³⁹ Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622, 12 L. R. A. 727; Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66; Moore v. Alexander, 63 App. Div. 100, 71 N. Y. Supp. 420. See ante, chapter IV, § 44.

laws, reissue and further negotiate the same, but cannot enforce payment thereof against any intervening party to whom he was personally liable.¹⁴⁰

¹⁴⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 50); Ariz. (§ 3353); Ill. (§ 50); Kan. (§ 57); Md. (§ 69); Mich. (§ 52); Neb. (§ 50); N. Y. (§ 80); Ohio (§ 3172 v); R. I. (§ 58); Wis. (§ 1676-20).

See *Scott v. First Nat. Bank*, 71 Ind. 445; *Montgomery & E. R. Co. v. Trebles*, 44 Ala. 255.

CHAPTER XI.

LIABILITIES AND RIGHTS OF PARTIES.

- § 150. In General.
- § 151. Of Maker.
- § 152. Of Drawer.
- § 153. Of Acceptor.
- § 154. Of Indorser—Who Deemed an Indorser.
- § 155. Indorser of Paper Negotiable by Delivery.
- § 156. Irregular Indorsers.
- § 157. Bills in Sets.
- § 158. Warranties—Negotiation by Delivery or Qualified Indorsement.
- § 159. Persons in Whose Favor Warranty Exists.
- § 160. Public or Corporate Securities.
- § 161. Warranties—Indorser Without Qualification.
- § 162. Contract of General Indorser.
- § 163. Consecutive and Joint Indorsers.
- § 164. Special Indorsers.
- § 165. Indorsement by Broker or Agent.
- § 166. Rights of Holder.
- § 167. Bona Fide Holders.
- § 168. Presumptions and Burden of Proof.
- § 169. Defenses Available Against Bona Fide Holders.
- § 170. Incomplete Instruments.
- § 171. Presumption of Delivery.
- § 172. Bona Fide Holder May Enforce Payment to Full Amount.
- § 173. Holder Not in Due Course.
- § 174. Same—Deriving Title From Holder in Due Course.

LIABILITY IN GENERAL.

- § 150. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided.

Persons dealing with negotiable paper are presumed to take it on the faith of the signatures thereon, and following this rule the negotiable instruments acts provide that, except for express

exceptions, no one is liable on an instrument unless his signature appears thereon.¹

LIABILITY OF MAKER.

§ 151. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

The liability of the maker of a negotiable instrument, based on the mere fact of its execution by him, is measured by the promise contained therein, which is that he will pay the instrument according to its tenor.² By making the instrument he also admits the existence of the payee, and his then capacity to indorse.³

¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 18); Ariz. (§ 3321); Ill. (§ 18); Kan. (§ 25); Md. (§ 37); Mich. (§ 20); Neb. (§ 18); N. Y. (§ 37); Ohio (§ 3171 q); R. I. (§ 26); Wis. (§ 1675-18).

Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064.

² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 60); Ariz. (§ 3363); Ill. (§ 60); Kan. (§ 67); Md. (§ 79); Mich. (§ 62); Neb. (§ 60); N. Y. (§ 110); Ohio (§ 3173 e); R. I. (§ 68); Wis. (§ 1677).

A collateral agreement that the maker shall not be personally liable on the instrument according to its tenor is not a defense. *Armstrong v. Scott*, 36 Fed. 63; *Hirsch v. Oliver*, 91 Ga. 554, 18 S. E. 354; *Hodgkins v. Moulton*, 100 Mass. 309; *Cumings v. Kent*, 44 Ohio St. 92, 4 N. E. 710, 58 Am. Rep. 796; *Reed v. Nicholson*, 37 Mo. App. 646. But an agreement that a note signed by trustees of the school district shall be the note of the district is a good defense to an action against the trustees individually. *Bingham v. Stewart*, 14 Minn. 214. An agreement between the maker and the president of the payee bank that the maker shall not be liable is a good defense to an action by a receiver of the bank. *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32.

The question of the liability of the maker to garnishment at the instance of a creditor of the payee, before maturity, is important. The rule is that, in the absence of a specific statute allowing it, the maker of

LIABILITY OF DRAWER.

§ 152. By drawing the instrument the drawer admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

The drawer also admits the existence of the payee, and his then capacity to indorse, and engages that, on due presentment, the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary steps on dishonor duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.⁴

a negotiable note is not subject to garnishment at the instance of a creditor of the payee before maturity of the note, "because, if this be done, he is liable to be made to pay the same debt twice over; and we find no authority for holding that the rule is different when he executed the note with the knowledge that it is the purpose of the payee to place the fund beyond the reach of his creditors." *Willis v. Heath*, 75 Tex. 124, 12 S. W. 971, 16 Am. St. Rep. 876. Indorsee of note executed by ten persons cannot maintain joint action against all, the note providing that the liability of each was limited to one-tenth the amount of the note. *National Bank v. Buckwalter*, 214 Pa. 289, 63 Atl. 689.

³ Same sections of negotiable instruments laws as last above cited.

Instruments payable to the order of a fictitious person are payable to bearer. See ante, § 51. That defendants issued and delivered check "to an imposter who falsely claimed to represent an association of 'freight handlers'" is no defense as against a bona fide holder. *Boles v. Harding*, 201 Mass. 103, 87 N. E. 481.

⁴ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 61); Ariz. (§ 3364); Ill.

The drawer may, however, insert in the instrument a stipulation negating or limiting his own liability to the holder,⁵ the theory being that an express stipulation of this kind conveys to the holder actual notice of the limitation of liability. By virtue of this provision an instrument may be drawn "without recourse" on the drawer.

LIABILITY OF ACCEPTOR.

§ 153. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

- 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and**
- 2. The existence of the payee and his then capacity to indorse.**

The drawee of a bill, who, as we have seen, is a mere stranger without liability before acceptance,⁶ becomes on acceptance a principal debtor,⁷ and engages to pay the bill according to the

(§ 61); Kan. (§ 68); Md. (§ 80); Mich. (§ 63); Neb. (§ 61); N. Y. (§ 111); Ohio (§ 3173 f); R. I. (§ 69); Wis. (§ 1677-1).

The drawer is discharged where the payee transmits the draft by mail, and fails to discover its loss for six months. *Bank of Gilby v. Farnsworth*, 7 N. D. 6, 72 N. W. 901, 38 L. R. A. 843. But a promise by the drawer to pay made with knowledge of the facts is a waiver of his right to such discharge. *Id.*

⁵ Same sections of negotiable instruments laws as last above cited.

For various agreements qualifying or limiting the liability of the maker or drawer, see *Collins v. Seay*, 35 Ala. 347; *King v. King*, 69 Ind. 467; *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689; *Commercial Bank v. Hart*, 10 Wash. 303, 38 Pac. 1114.

⁶ See ante, § 88.

⁷ *Capital City Ins. Co. v. Quinn*, 73 Ala. 558; *Parmelee v. Williams*, 72 Ga. 42; *Trimble v. City Nat. Bank*, 12 Ky. Law Rep. 909, 15 S. W. 853; *Green v. Goings*, 7 Barb. (N. Y.) 652. A bill when accepted becomes similar to a promissory note, the acceptor being the promisor, and the drawer standing in the relation of an indorser. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, affg. 118 App. Div. 412, 103

tenor of the acceptance.⁸ By the acceptance the acceptor also admits the existence of the drawer and the genuineness of his signature,⁹ for it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine, as he is presumed to know the drawer's handwriting; and, if the drawee accepts or pays the bill to which the drawer's name has been forged, he can neither repudiate the acceptance nor recover the money paid,¹⁰ even from the person to whom it was paid, the latter not being the forger, although the position of the parties to such person has not changed in any respect.¹¹ In such case the drawee can acquire no rights as against the person to whom payment was

N. Y. Supp. 584. The acceptor of a bill of exchange becomes primarily liable for its payment, and is to be considered the principal debtor; and this is true even if the acceptance was for the accommodation of the drawer, the acceptor having no funds of the drawer in his hands to pay it. *Huston v. Newgass*, 234 Ill. 285, 84 N. E. 910. But see *Canadian Bank of Commerce v. Coumbe*, 47 Mich. 358, 11 N. W. 196, where it was held that a payee with notice that an acceptance was for accommodation cannot treat the acceptor as a principal debtor, but can treat him as a surety only. As a general rule an accommodation acceptor is considered to be a surety as between himself and the drawer. *Child v. Eureka Powder Works*, 44 N. H. 354; *In re Babcock*, Fed. Cas. No. 696.

⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 62); Ariz. (§ 3365); Ill. (§ 62); Kan. (§ 69); Md. (§ 81); Mich. (§ 64); Neb. (§ 62); N. Y. (§ 112); Ohio (§ 3173 g); R. I. (§ 70); Wis. (§ 1677-2).

Greene v. Duncan, 37 S. C. 239, 15 S. E. 956.

Damages recoverable on protest of foreign bill, see post, § 211.

⁹ Same sections of negotiable instruments laws as last above cited.

Price v. Neal, 3 Burrows, 1354; *United States Bank v. Bank of Georgia*, 23 U. S. (10 Wheat.) 333, 6 Law. Ed. 334; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615; *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Adam v. Manufacturers' & Traders' Nat. Bank*, 63 Misc. 403, 116 N. Y. Supp. 595.

¹⁰ *Title Guarantee & Trust Co. v. Haven*, 126 App. Div. 802, 111 N. Y. Supp. 305.

¹¹ *Title Guarantee & Trust Co. v. Haven*, 126 App. Div. 802, 111 N. Y. Supp. 305.

made or any person interested in sustaining the payment as valid,¹² nor can he be subrogated to the rights of any such party.¹³ He also admits the drawer's capacity¹⁴ and authority¹⁵ to draw the instrument, the existence of the payee and his then capacity to indorse,¹⁶ and the existence of funds of the drawer in his hands.¹⁷ The acceptor is liable as well to a holder who took before the acceptance as to one who took after,¹⁸ and is not discharged by failure of the holder to sue the drawer,¹⁹ or by a refusal of the holder to allow the acceptor to take up the bill at maturity.²⁰ The acceptor cannot show that his acceptance, absolute on its face, was in fact conditional,²¹ nor can he show, as against the payee, a subsequent agreement between himself and the drawer modifying the terms of the acceptance.²² If the drawee accepts unconditionally while in funds, he cannot show, as against the payee, that the drawer had previously assigned the funds, the payee having been ignorant of the assignment at the time he took the bill.²³ If the drawee accepts, in his individual capacity, a bill drawn on

¹² Title Guarantee & Trust Co. v. Haven, 126 App. Div. 802, 111 N. Y. Supp. 305.

¹³ Title Guarantee & Trust Co. v. Haven, 126 App. Div. 802, 111 N. Y. Supp. 305.

¹⁴ Same sections of negotiable instruments laws as last above cited.

Acceptor of bill drawn by married woman is estopped to deny her competency. Cowton v. Wickersham, 54 Pa. 302.

¹⁵ Same sections of negotiable instruments laws as last above cited.

¹⁶ Same sections of negotiable instruments laws as last above cited.

¹⁷ This provision is not in the negotiable instruments laws, but is a general rule of law. See cases cited in § 96, and Bradley v. McClellan, 11 Tenn. (3 Yerg.) 301; Jordan v. Tarkington, 15 N. C. (4 Dev.) 357.

¹⁸ Heuertematte v. Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657; Iselin v. Chemical Nat. Bank, 16 Misc. 437, 40 N. Y. Supp. 388; Credit Co. v. Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123; Arpin v. Owens, 140 Mass. 144, 3 N. E. 25.

¹⁹ Diversy v. Moor, 22 Ill. 331, 74 Am. Dec. 157.

²⁰ Williams v. Theodore, 34 La. Ann. 89. But see First Nat. Bank v. Day, 64 Iowa, 118, 19 N. W. 882, where the acceptor was held to be discharged by an agreement not to sue him.

²¹ Flournoy v. First Nat. Bank, 79 Ga. 810, 2 S. E. 547.

²² Mason v. Graff, 35 Pa. 448.

²³ Tucker v. Welsh, 17 Mass. 160, 9 Am. Dec. 137.

him as agent or other representative, he becomes personally liable;²⁴ but an acceptance, in a representative capacity, of a bill drawn on the drawee as an individual, negatives an intent to become personally liable, and is not a sufficient acceptance of the bill.²⁵ By this assent or acceptance the drawee undertakes to pay the bill at maturity²⁶ in money.²⁷

By certifying a check on a deposit with it, a bank estops itself to deny the existence of the drawer, the genuineness of his signature, and the sufficiency of funds to pay the check, and promises to pay it on demand.²⁸ The bank, by certifying a check, admits also the existence of the payee, and his then capac-

²⁴ Arnold v. Sprague, 34 Vt. 402; Taber v. Cannon, 49 Mass. (8 Metc.) 456; Lallerstedt v. Griffin, 29 Ga. 708.

²⁵ Walker v. Bank of State of New York, 13 Barb. (N. Y.) 636. Directors of a corporation whose charter does not give authority to accept bills of exchange are personally liable on their acceptances purporting to be for the company. West London Commercial Bank v. Kitson, 13 Q. B. Div. 360.

²⁶ Hoffman v. Bank of Milwaukee, 79 U. S. (12 Wall.) 181, 20 Law. Ed. 366.

²⁷ Same sections of negotiable instruments laws as last above cited, and Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 1); Ariz. (§ 3304); Ill. (§ 1); Kan. (§ 8); Md. (§ 20); Mich. (§ 3); Neb. (§ 1); N. Y. (§ 20); Ohio (§ 3171); R. I. (§ 9); Wis. (§ 1675-1).

²⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 62); Ariz. (§ 3365); Ill. (§ 62); Kan. (§ 69); Md. (§ 81); Mich. (§ 64); Neb. (§ 62); N. Y. (§ 112); Ohio (§ 3173 g); R. I. (§ 70); Wis. (§ 1677-2).

Marine Nat. Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; *Willets v. Phoenix Bank*, 9 N. Y. Super Ct. (2 Duer) 121. The certificate by a bank that a check is good is equivalent to acceptance, and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. *Blake v. Hamilton Dime Sav. Bank Co.*, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290. The transfer of a certified check is an assignment of money to meet it, and the bank making the certification is liable therefor to the holder. *Id.*

ity to indorse the check,²⁹ but does not admit the genuineness of the indorser's signature.³⁰ Certification of a check operates as an assignment,³¹ and the object of certifying being to enable a holder to use the check as money, the drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay.³² But a bank is not liable on a check certified by it and payable to order, where it is cashed by another bank without the indorsement of the payee.³³

OF INDORSER—WHO DEEMED AN INDORSER.

§ 154. A person placing his signature upon an instrument other wise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

Following the apparent general policy of the act to make irregular parties indorsers, the negotiable instruments acts provide that where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is deemed an indorser.³⁴ This rule applies only to cases of doubt arising out of the location of the signature on the instrument, and does not apply where the doubt is as to whether

²⁹ Same sections of negotiable instruments laws as last above cited.

But see *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289.

³⁰ *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289.

³¹ *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83.

³² *Blake v. Hamilton Dime Sav. Bank Co.*, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290.

³³ *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 16 Am. St. Rep. 765, 7 L. R. A. 595.

³⁴ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 17); Ariz. (§ 3320); Ill. (§ 17); Kan. (§ 24); Md. (§ 36); Mich. (§ 19); Neb. (§ 17); N. Y. (§ 36); Ohio (§ 3171 p); R. I. (§ 25); Wis. (§ 1675-17).

the party intended to sign in an individual or in a representative capacity as maker.³⁵ Under this provision, if a bill is drawn to the order of the drawer, one who writes his name across the face of the instrument is an indorser, not an acceptor.³⁶

Consistent with and following the above mentioned rule, the negotiable instruments acts provide that one placing his signature on an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity;³⁷ a party's status being fixed by this rule, parol evidence is not admissible to alter it.³⁸ It follows that persons placing their signatures on the back of the note before delivery for the accommodation of the maker are indorsers and cannot be held as joint

³⁵ *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

³⁶ *Walton v. Williams*, 44 Ala. 347.

³⁷ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 63); Ariz. (§ 3366); Ill. (§ 63); Kan. (§ 70); Md. (§ 82); Mich. (§ 65); Neb. (§ 63); N. Y. (§ 113); Ohio (§ 3173 h); R. I. (§ 71); Wis. (§ 1677-3).

Walker v. Dunham, 135 Mo. 396, 115 S. W. 1086; *Roessler v. Lancaster*, 130 App. Div. 1, 114 N. Y. Supp. 387; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Downey v. O'Keefe*, 26 R. I. 571, 59 Atl. 929; *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592; *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455; *Farquhar v. Higham*, 16 N. D. 106, 112 N. W. 557; *Gibbs v. Guaraglia*, 75 N. J. Law, 168, 67 Atl. 81; *Wilson v. Hendee*, 74 N. J. Law, 640, 66 Atl. 413; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886; *Far Rockaway Bank v. Norton*, 186 N. Y. 484, 79 N. E. 709; *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 124 Am. St. Rep. 275; *Mercantile Bank v. Busby* (Tenn.) 113 S. W. 390. This abrogates the old rule declared in some states (see *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256) that the signature of a third party upon the back of a negotiable instrument prior to its delivery to the payee creates no implied or commercial contract whatever (*Wilson v. Hendee*, 74 N. J. Law, 640, 66 Atl. 413). A partner by individually indorsing a firm note becomes an indorser as well as maker. *National Exch. Bank v. Lubrano* (R. I.) 68 Atl. 944. Placing one's name on the back of a note prior to delivery. *Bank of Montpelier v. Montpelier Lumber Co.* (Idaho) 102 Pac. 685.

Liability or irregular indorser, see post, § 156.

³⁸ *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886.

makers on the ground that the holder would not have taken the note without their signatures.³⁹ Following this rule, it has been held that the signing of a guaranty of payment, combined with waiver of demand, notice and protest, constitutes the signers of such an indorsement, who are payees of the note, indorsers and not guarantors,⁴⁰ and that adding a guaranty subsequent to one's indorsement does not change or affect the character of the latter.⁴¹ Being indorsers, such persons are entitled to demand, protest and notice.⁴²

§ 155. Where a person places his indorsement on an instrument negotiable by delivery, he incurs all the liabilities of an indorser.

A person who places his indorsement on an instrument negotiable by delivery incurs all the liabilities of an indorser.⁴³ This is true, of course, whether the indorsement is for accommodation or is placed on the instrument in ignorance of the fact that it is negotiable by delivery and that the indorsement is unnecessary. The rule holds also where the indorsement is coupled with a guaranty of payment.⁴⁴

³⁹ Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847.

⁴⁰ Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269.

⁴¹ Elgin City Banking Co. v. Hall (Tenn.) 108 S. W. 1068.

⁴² Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; J. W. Perry Co. v. Taylor Bros., 148 N. C. 362, 62 S. E. 423.

⁴³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 67); Ariz. (§ 3370); Ill. (§ 67); Kan. (§ 74); Md. (§ 86); Mich. (§ 69); Neb. (§ 67); N. Y. (§ 117); Ohio (§ 3173 1); R. I. (§ 75); Wis. (§ 1677-7).

Doom v. Sherwin, 20 Colo. 234, 38 Pac. 56; Tillman v. Ailles, 5 Smedes & M. 373; Brush v. Reeves' Adm'rs, 3 Johns. (N. Y.) 439.

⁴⁴ Leggett v. Raymond, 6 Hill (N. Y.) 639.

SAME—LIABILITY OF IRREGULAR INDORSER.

§ 156. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties;
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer;
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

The courts differ widely as to the status and liability of a person not otherwise a party, who places his signature in blank on a negotiable instrument before delivery. The weight of authority has classed such a person as a joint maker,⁴⁵ but he has been held by some courts to be an indorser,⁴⁶ and by others to be a guar-

⁴⁵ Byers v. Tritch, 12 Colo. App. 377, 55 Pac. 622; Allen v. Brown, 124 Mass. 77; Gumz v. Giegling, 108 Mich. 295, 66 N. W. 48; Stein v. Passmore, 25 Minn. 256; McCallum v. Driggs, 35 Fla. 277, 17 So. 407; Salisbury v. First Nat. Bank, 37 Neb. 872, 56 N. W. 727, 40 Am. St. Rep. 527; Jackson Bank v. Irons, 18 R. I. 718, 30 Atl. 420. But see Moorman v. Wood, 117 Ind. 144, 19 N. E. 739.

⁴⁶ Fisk v. Miller, 63 Cal. 367; Davis v. Barron, 13 Wis. 254. The status of such a signer has also been held to be that of a second indorser. Bogue v. Melick, 25 Ill. 91; Collins v. Everett, 4 Ga. 266; Baker v. Martin, 3 Barb. (N. Y.) 634; Lester v. Paine, 39 Barb. (N. Y.) 616; Deering v. Creighton, 19 Or. 118, 24 Pac. 198, 20 Am. St. Rep. 800. But evidence was admissible to show that the indorsement was made for accommodation, in which case the status would be that of a first indorser. Coulter v. Richmond, 59 N. Y. 478. On the rights and liabilities of anomalous or irregular indorsers, see, also, Seabury v. Hungerford, 2 Hill (N. Y.) 80; Hall v. Newcomb, 7 Hill (N. Y.) 416, 42 Am. Dec. 82; Union Bank v. Willis, 49 Mass. (8 Metc.) 504, 22 S. W. 211, 36 Am. St. Rep. 100; Fessenden v. Summers, 62 Cal. 484; Bank of Jamaica v. Jefferson, 92 Tenn. 537, 41 Am. Dec. 541.

antor,⁴⁷ and by still others to be a mere surety.⁴⁸ The negotiable instruments laws settle the difficulty by providing that such a signer shall be liable as indorser according to the following rules:

"(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties."⁴⁹

"(2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer."⁵⁰

"(3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."⁵¹

This section should be construed with the other sections of the act,⁵² and when so construed is limited in its application to the liability of the parties where the paper is with the public as a nego-

⁴⁷ *Portsmouth Sav. Bank v. Wilson*, 5 App. D. C. 8; *Varley v. Title Guarantee & Trust Co.*, 60 Ill. App. 565; *Arnold v. Bryant*, 71 Ky. (8 Bush) 668.

⁴⁸ *Killian v. Ashley*, 24 Ark. 511, 91 Am. Dec. 519; *Rogers v. Gibbs*, 24 La. Ann. 468.

⁴⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 64); Ariz. (§ 3367); Ill. (§ 64); Kan. (§ 71); Md. (§ 83); Mich. (§ 66); Neb. (§ 64); N. Y. (§ 114); Ohio (§ 3173 i); R. I. (§ 72); Wis. (§ 1677-4).

A. B. Farquhar Co. v. Higham, 16 N. D. 10, 112 N. W. 557; *Guttman v. Abbott*, 110 N. Y. Supp. 376. In a recent New York case it was held that where an action on a note was begun before the passage of the negotiable instruments law, the complaint alleging execution of the note by defendant, and its delivery, should have alleged that the note was indorsed to give credit to the maker, or as surety for him, as required by statute prior to the passage of the negotiable instruments laws, and that the defect was not cured by section 114 of said law. *McMoran v. Lange*, 25 App. Div. 11, 48 N. Y. Supp. 1000.

⁵⁰ Subdivision 2 of same sections of negotiable instruments laws as last above cited.

⁵¹ Subdivision 3 of same sections of negotiable instruments laws as last above cited.

⁵² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 68); Ariz. (§ 3371); Ill. (§ 68); Kan. (§ 75); Md. (§ 87); Mich. (§ 70); Neb. (§ 68); N. Y. (§ 118); Ohio (§ 3173 m); R. I. (§ 76); Wis. (§ 1677-8).

liable instrument,⁵³ and does not govern the rights of an indorser before delivery as against a maker of a bill,⁵⁴ nor does it define the rights and liabilities of several irregular indorsers as between themselves.⁵⁵

This section changes the law in many of the states,⁵⁶ and has been held in New York to apply only to indorsement before delivery.⁵⁷ Actual ownership of commercial paper and use thereof by the owner are essential to sustain irregular indorsements.⁵⁸ As to indorsers signing for the accommodation of the maker before indorsement by the payee, the defenses of invalidity and want of consideration are open in the same way as they would be in an action against the maker.⁵⁹ In cases arising under the third subdivision, parol evidence is admissible and necessary to establish whether the indorser signed for the accommodation of the payee.⁶⁰

⁵³ *Haddock, Blanchard & Co. v. Haddock*, 118 App. Div. 412, 103 N. Y. Supp. 584.

⁵⁴ *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136, afg. 118 App. Div. 412, 103 N. Y. Supp. 584. See post, § 162.

⁵⁵ *Wilson v. Hendee*, 74 N. J. Law, 640, 66 Atl. 413. See post, § 163.

⁵⁶ *Far Rockaway Bank v. Norton*, 186 N. Y. 484, 79 N. E. 709, afg. 110 App. Div. 917, 96 N. Y. Supp. 1124; *Roessler v. Lancaster*, 130 App. Div. 1, 114 N. Y. Supp. 387. One who indorses negotiable paper in blank before delivery to give credit to the acceptor is deemed an indorser. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, afg. 118 App. Div. 412, 103 N. Y. Supp. 584. This changes the New York rule that such a party is presumably a second indorser and not liable to the payee, though this presumption was rebuttable by parol evidence. *Id.*; *Gibbs v. Guaraglia*, 75 N. J. Law, 168, 67 Atl. 81. A person who, being a stranger to a promissory note, places his name on the back by blank indorsement, is an indorser of the paper and cannot be held in any other capacity. *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842.

⁵⁷ *Kohn v. Consolidated Butter & Egg Co.*, 63 N. Y. Supp. 265.

⁵⁸ *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, afg. 51 Misc. 103, 100 N. Y. Supp. 740, and 118 App. Div. 907, 103 N. Y. Supp. 1141.

⁵⁹ *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644.

⁶⁰ *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, afg. 118 App. Div. 412, 103 N. Y. Supp. 584; *Mercantile Bank v. Busby* (Tenn.) 113 S. W. 390.

Like other indorsers, the liability of an irregular indorser is contingent upon failure of the maker to pay, accompanied by due demand, notice and protest.⁶¹

BILLS IN SETS.

§ 157. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

A holder who indorses two or more parts of a set to different persons is liable on each part, and, generally, every indorser subsequent to him is liable on the part he has himself indorsed, as if such part were a separate bill.⁶²

WARRANTIES.

§ 158. Every person negotiating an instrument by delivery, or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

§ 159. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

⁶¹ Guttman v. Abbott, 110 N. Y. Supp. 376; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842.

⁶² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 180); Ariz. (§ 3483); Ill.

§ 160. The provisions of subdivision three do not apply to persons negotiating public or corporate securities other than bills and notes.

Every person negotiating an instrument by delivery or by a qualified indorsement warrants that it is genuine and in all respects what it purports to be;⁶³ that he has a good title to it;⁶⁴ that all prior parties had capacity to contract⁶⁵ (this does not apply to persons negotiating public or corporate securities other than bills and notes);⁶⁶ that he has no knowledge of any fact that would impair the validity of the instrument or render it value-

(§ 179); Kan. (§ 187); Md. (§ 199); Mich. (§ 182); Neb. (§ 179); N. Y. (§ 312); Ohio (§ 3177 q); R. I. (§ 188); Wis. (§ 1681-37).

⁶³ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 65); Ariz. (§ 3368); Ill. (§ 65); Kan. (§ 72); Md. (§ 84); Mich. (§ 67); Neb. (§ 65); N. Y. (§ 115); Ohio (§ 3173 j); R. I. (§ 73); Wis. (§ 1677-5).

Barton v. Trent, 40 Tenn. (3 Head) 167; Meyer v. Richards, 163 U. S. 385, 41 Law. Ed. 199; Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171; Thompson v. McCullough, 31 Mo. 224, 77 Am. Dec. 644; Merriam v. Wolcott, 85 Mass. (3 Allen) 258, 80 Am. Dec. 69.

Damages for breach of warranty, see Coolidge v. Brigham, 42 Mass. (1 Metc.) 547, 46 Mass. (5 Metc.) 68; Giffert v. West, 33 Wis. 617. What instruments negotiable by delivery, see ante, §§ 123, 124. What is a qualified indorsement, see ante, § 135. Liability of indorser "without recourse," see ante, §§ 132, 133.

⁶⁴ Subdivision 2 of same sections of negotiable instruments laws as last above cited.

Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994, reversing 55 N. Y. Super. Ct. 233; Murray v. Judah, 6 Cow. (N. Y.) 484; Merriam v. Wolcott, 85 Mass. (3 Allen) 258, 80 Am. Dec. 69.

⁶⁵ Subdivision 3 of same sections of negotiable instruments laws as last above cited.

Glidden v. Chamberlin, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479; Lobdell v. Baker, 44 Mass. (3 Metc.) 469.

⁶⁶ Subdivision 4 of same sections of negotiable instruments laws as last above cited.

Otis v. Cullum, 92 U. S. 447, 23 Law. Ed. 496 (municipal bonds).

less.⁶⁷ Where the negotiation is by delivery, the warranty extends only to the immediate transferee.⁶⁸

§ 161. Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. **The matters and things mentioned in subdivisions one, two and three, of the next preceding section;**
2. **That the instrument is at the time of his indorsement valid and subsisting.**

§ 162. And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

The warranties herein treated apply to "every indorser who indorses without qualification."⁶⁹ The word "every" as here used is a term of inclusion,⁷⁰ and it embraces every party who, by previous provisions, is classed as an indorser, unless his indorsement

⁶⁷ Same subdivisions and sections of negotiable instruments laws as last above cited.

That one negotiating without delivery does not warrant the solvency of the maker, see *Milliken v. Chapman*, 75 Me. 306, 49 Am. Rep. 615; *Burgess v. Chapin*, 5 R. I. 225. But see *Stewart v. Orvis*, 47 How. Pr. (N. Y.) 518.

Where the seller of a check knows the drawer to be insolvent, he cannot recover the price to be paid for the check. *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404.

⁶⁸ Same subdivision and sections of negotiable instruments laws as last above cited.

⁶⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 66); Ariz. (§ 3369); Ill. (§ 66); Kan. (§ 73); Md. (§ 85); Mich. (§ 68); Neb. (§ 66); N. Y. (§ 116); Ohio (§ 3173 k); R. I. (§ 74); Wis. (§ 1677-6).

⁷⁰ *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842.

has been qualified by appropriate words.⁷¹ It will thus be seen that one who indorses a negotiable instrument without qualification is liable as a general indorser, though it had been indorsed to him restrictively, i. e., for collection or deposit. The rule is very important, especially with reference to checks indorsed for collection, and subsequently indorsed without qualification by the bank or other collecting agent. It is very important, also, because it changes the law, the rule formerly being that the indorsement of a collecting bank does not imply a warranty that a prior indorsement is genuine.⁷²

Following the law merchant the warranties only exist in favor of "subsequent holders in due course,"⁷³ and hence an indorser does not warrant to the drawee the genuineness of the drawer's signature;⁷⁴ and following this rule it has been held that one who is both the maker and holder of a note indorsed in blank cannot sue the indorser on the note.⁷⁵

An indorser who indorses without qualification warrants to all subsequent holders in due course that the instrument is genuine

⁷¹ *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842.

⁷² *United States v. American Exch. Nat. Bank*, 70 Fed. 232. The rule heretofore was that a collecting bank indorsing generally was not liable to the paying bank in case the check had been raised. *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 28, 20 N. E. 632, 11 Am. St. Rep. 612. See, also, *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Mowatt v. McLelan*, 1 Wend. (N. Y.) 173; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566, holding that, when a collecting bank acted merely as agent, it could not be required to repay, where it had paid the amount collected to its principal without notice.

⁷³ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 66); Ariz. (§ 3369); Ill. (§ 66); Kan. (§ 73); Md. (§ 85); Mich. (§ 68); Neb. (§ 66); N. Y. (§ 116); Ohio (§ 3173 k); R. I. (§ 74); Wis. (§ 1677-6).

Bruck v. Lambeck, 63 Misc. 117, 118 N. Y. Supp. 494.

⁷⁴ *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817.

⁷⁵ *Abramowitz v. Abramowitz*, 113 N. Y. Supp. 798. If an accommodation maker for indorser's benefit, proper remedy is an action for money paid. *Id.*

and in all respects what it purports to be.⁷⁶ This includes a warranty against fraud⁷⁷ and forgery,⁷⁸ that he has good title to it,⁷⁹ that all prior parties had capacity to contract,⁸⁰ that the instru-

⁷⁶ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 66); Ariz. (§ 3369); Ill. (§ 66); Kan. (§ 73); Md. (§ 85); Mich. (§ 68); Neb. (§ 66); N. Y. (§ 116); Ohio (§ 3173 k); R. I. (§ 74); Wis. (§ 1677-6).

State v. Corning State Sav. Bank, 139 Iowa, 338, 115 N. W. 937; Crosby v. Wright, 70 Minn. 251, 73 N. W. 162. The indorser warrants the genuineness of the signature of the maker. Brown v. Ames, 59 Minn. 476, 61 N. W. 448; Condon v. Pearce, 43 Md. 83; First Nat. Bank v. Northwestern Nat. Bank, 40 Ill. App. 640; Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523.

⁷⁷ That the maker's signature was obtained by fraud is no defense to an indorser. Where note was part performance of a written contract to which indorser was not a party. Elliott v. Brady, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. (N. S.) 600.

⁷⁸ Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, *afd.* 180 N. Y. 549, 73 N. E. 1129. Accommodation indorser liable; former indorsement a forgery. Oriental Bank v. Gallo, 112 App. Div. 360, 98 N. Y. Supp. 561. Indorsement proving a forgery remote, subsequent indorsee need not let suit by holder against him go to judgment before paying; paying before judgment is not voluntary so as to release intervening indorsers. *Id.* An indorser of a forged paper is liable to a bona fide holder. Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440; Lennon v. Grauer, 2 App. Div. 513, 38 N. Y. Supp. 22. See, also, National Bank of North America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; Turnbull v. Bowyer, 40 N. Y. 456. Liability of indorser without recourse, see *ante*, §§ 132, 133.

⁷⁹ Same sections of negotiable instruments laws as last above cited.

State v. Corning State Sav. Bank, 139 Iowa, 338, 115 N. W. 937; Furgerson v. Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470.

⁸⁰ Same sections of negotiable instruments laws as last above cited.

Leonard v. Draper, 187 Mass. 536, 73 N. E. 644.

Warranty as to capacity of maker. Dalrymple v. Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438; Archer v. Shea, 14 Hun (N. Y.) 493; Kilgore v. Bulkley, 14 Conn. 362.

Warranty as to capacity of prior indorser. Prescott Bank v. Caverly, 73 Mass. (7 Gray) 217; Ogden v. Blydenburgh, 1 Hilt. (N. Y.) 182. Under the negotiable instruments laws the indorsement or assignment of a negotiable instrument by a corporation or an infant passes the property therein, notwithstanding that from want of capacity the corporation or

ment is, at the time of his indorsement, valid and subsisting,⁸¹ and hence cannot defend on ground that note was void because of usury in its inception.⁸² The warranties provided by this section apply only to the condition of the instrument when it left the indorser's hand and do not apply to subsequent alterations.⁸³

In addition to the above such an indorser engages that on due presentment the instrument shall be accepted and paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it,⁸⁴ though of course his

infant may incur no liability thereon as indorsee or otherwise. Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Ore., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 22); Ariz. (§ 3325); Ill. (§ 22); Kan. (§ 29); Md. (§ 41); Mich. (§ 24); Neb. (§ 22); N. Y. (§ 41); Ohio (§ 3171 v); R. I. (§ 30); Wis. (§ 1675-22).

To same effect see, as to indorsement or transfer by infant, *Roach v. Woodall*, 91 Tenn. 206, 18 S. W. 407, 30 Am. St. Rep. 883; *Semple v. Morrison*, 23 Ky. (7 T. B. Mon.) 298; and as to indorsement or transfer by corporation, *Brown v. Donnell*, 49 Me. 421, 77 Am. Dec. 266; *Clark v. Farrington*, 11 Wis. 321.

⁸¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 66); Ariz. (§ 3369); Ill. (§ 66); Kan. (§ 73); Md. (§ 85); Mich. (§ 68); Neb. (§ 66); N. Y. (§ 116); Ohio (§ 3173 K); R. I. (§ 74); Wis. (§ 1677-6).

Leonard v. Draper, 187 Mass. 536, 73 N. E. 644. Accommodation indorser. *Packard v. Windholz*, 88 App. Div. 365, 84 N. Y. Supp. 666, affd 180 N. Y. 549, 73 N. E. 1129.

⁸² *Horowitz v. Wollowitz*, 59 Misc. 520, 110 N. Y. Supp. 972.

⁸³ *First Nat. Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445.

⁸⁴ Same sections of negotiable instruments laws as last above cited.

Ankeny v. Henry, 1 Idaho, 229, where the court used this language: "The undertaking of an indorser is conditional; that is, his promise is that he will pay, provided the payment shall first have been properly demanded of the maker, and due notice of his neglect or refusal shall have been given." *State v. Corning State Sav. Bank*, 139 Iowa, 338, 115 N. W. 937. The indorser contracts to pay the note at maturity if duly presented for payment to the maker, and the indorser is thereafter duly notified of such presentment. *A. B. Farquhar Co. v. Higham*, 16 N. D. 106, 112 N. W. 557. See post, chapter XII, Presentment for Payment.

rights in this matter may be waived, either expressly or impliedly.⁸⁵ After default and notice the indorser's liability is still separate, independent and distinct from that of the maker, and hence a payment on account by the latter will not stop the running of limitations as against the indorser.⁸⁶ The possession of a promissory note by an indorser, after its protest for nonpayment by the holder, is *prima facie* evidence that he has performed his contract of indorsement and has paid to the holder the amount due upon the note.⁸⁷

CONSECUTIVE AND JOINT INDORSERS.

§ 163. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorseees who indorse are deemed to indorse jointly and severally.

As between themselves, indorsers are liable *prima facie* in the order in which they indorse,⁸⁸ but parol⁸⁹ evidence is admissible to show that as between or among themselves they have agreed

⁸⁵ *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775. See post, chapter XII, § 194.

⁸⁶ *Mason v. Kilcourse*, 71 N. J. Law, 472, 59 Atl. 21.

⁸⁷ *Hill v. Buchanan*, 71 N. J. Law, 301, 60 Atl. 952.

⁸⁸ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 68); Ariz. (§ 3371); Ill. (§ 68); Kan. (§ 75); Md. (§ 87); Mich. (§ 70); Neb. (§ 68); N. Y. (§ 118); Ohio (§ 3173 m); R. I. (§ 76); Wis. (§ 1677-8).

Morgan v. Thompson, 72 N. J. Law, 244, 62 Atl. 410; *Coolidge v. Wiggin*, 62 Me. 568. See, also, *Williams v. Merchants' Bank*, 67 Tex. 606.

⁸⁹ Maker of a bill payable to himself and indorsed by him is an indorser, and as between him and subsequent indorsers parol evidence is authorized to determine their liability. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, affg. 118 App. Div. 412, 103 N. Y. Supp. 584; *Wilson v. Hendee*, 74 N. J. Law, 640, 66 Atl. 413.

otherwise.⁹⁰ This section is not inconsistent with that heretofore considered providing for the liability of an irregular indorser,⁹¹ for as we have seen the two sections should be read together and so construed the latter section refers to the liability of the parties while the paper is with the public as a negotiable instrument; while the one now being considered defines the rights of the indorsers as between themselves where the negotiable character of the instrument is unimportant.⁹² Under this rule it may be shown that the indorsers had agreed on a joint liability,⁹³ either as cosureties⁹⁴ or otherwise, or that each should contribute equally.⁹⁵ Also, the rights and liabilities of an indorser before delivery as against a maker of the bill are to be determined under the section under consideration.⁹⁶

⁹⁰ Same sections of negotiable instruments laws as last above cited.

Morgan v. Thompson, 72 N. J. Law, 244, 62 Atl. 410; *Coolidge v. Wiggin*, 62 Me. 568. See, also, *Cauthen v. Central Georgia Bank*, 69 Ga. 733.

⁹¹ See ante, § 156.

⁹² *Haddock, Blanchard & Co. v. Haddock*, 118 App. Div. 412, 103 N. Y. Supp. 584; *Wilson v. Hendee*, 74 N. J. Law, 640, 66 Atl. 413. It follows that an irregular indorser of drafts who indorses them in order to give credit to the acceptors under an agreement that he should be liable for goods furnished the acceptors is liable to the maker on his indorsement, when the acceptor fails to pay. *Haddock, Blanchard & Co. v. Haddock*, 118 App. Div. 412, 103 N. Y. Supp. 584. The former section (Neg. Inst. Laws N. Y., § 64) was never intended to create an incontestable liability against irregular indorsers. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, affg. 118 App. Div. 412, 103 N. Y. Supp. 584. Nor does said section establish a rule as to the liability of an irregular indorser conclusive on the parties to the instrument as between themselves, where the facts show a different intention. *Id.* See ante, § 156.

⁹³ *Phillips v. Preston*, 46 U. S. (5 How.) 278, 12 Law. Ed. 396; *Williams v. Smith*, 48 Me. 135.

⁹⁴ *Clapp v. Rice*, 79 Mass. (13 Gray) 403, 74 Am. Dec. 639; *Farwell v. Ensign*, 66 Mich. 600, 33 N. W. 734; *Easterly v. Barber*, 66 N. Y. 433; *Love v. Wall*, 8 N. C. (1 Hawks) 313.

⁹⁵ *Ross v. Espy*, 66 Pa. 481, 5 Am. Rep. 394; *Kiel v. Choate*, 92 Wis. 517, 67 N. W. 431.

⁹⁶ *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, affg. 118 App. Div. 412, 103 N. Y. Supp. 584.

Joint payees or indorsers.

Joint payees or indorsees who indorse are deemed to indorse jointly and severally.⁹⁷ Heretofore they have been held to a joint liability only.⁹⁸

SPECIAL INDORSERS.

§ 164. A person indorsing specially an instrument payable to bearer is liable as indorser to only such holders as make title through his indorsement.

While a special indorsement of an instrument payable to bearer does not prevent further negotiation by delivery,⁹⁹ still the person so indorsing is liable as an indorser only to such holders as make title through his indorsement.¹⁰⁰

INDORSEMENT BY BROKER OR AGENT.

§ 165. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities of a transferrer by delivery or by a qualified indorsement, unless he discloses the name of his principal and the fact that he is acting only as agent.

A broker or other agent negotiating an instrument without indorsement incurs all the liabilities of a transferrer by delivery or

⁹⁷ Same sections of negotiable instruments laws as last above cited.

⁹⁸ *Lane v. Stacy*, 90 Mass. (8 Allen) 41, holding that joint payees are joint and not successive indorsers, and that it makes no difference whose name appears first. See, also, *Woodward v. Severance*, 89 Mass. (7 Allen) 340. For successive indorsers held to several liability, see *Scott v. Doneghy*, 56 Ky. (17 B. Mon.) 321; *Hackett v. Linares*, 16 La. Ann. 204; *Chalmers v. McMurdo*, 5 Munf. (Va.) 252, 7 Am. Dec. 684; *Slack v. Kirk*, 67 Pa. 380, 5 Am. Rep. 438.

⁹⁹ See ante, § 129.

¹⁰⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 40); Ariz. (§ 3343); Ill. (§ 40); Kan (§ 47); Md. (§ 57); Mich. (§ 42); Neb. (§ 40); N. Y. (§ 70); Ohio (§ 31721); R. I. (§ 48); Wis. (§ 1676-10).

by a qualified indorsement, unless he discloses the name of his principal, and the fact that he is acting as agent.¹⁰¹

RIGHTS OF HOLDERS.

§ 166. The holder of a negotiable instrument is prima facie the owner and may sue thereon in his own name.

The holder of a negotiable instrument is prima facie the owner thereof and may sue thereon in his own name, and this though there are subsequent indorsements on the note,¹⁰² and this rule is especially true of the payee.¹⁰³ So, also, the holder of a negotiable instrument for the purposes of collection may, under this section, sue thereon in his own name, and payment to him in due course discharges the instrument and relieves the makers of it.^{103a}

¹⁰¹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 69); Ariz. (§ 3372); Ill. (§ 69); Kan. (§ 76); Md. (§ 88); Mich. (§ 71); Neb. (§ 69); N. Y. (§ 119); Ohio (§ 3173 n); R. I. (§ 77); Wis. (§ 1677-9).

¹⁰² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 51); Ariz. (§ 3354); Ill. (§ 51); Kan. (§ 58); Md. (§ 70); Mich. (§ 53); Neb. (§ 51); N. Y. (§ 90); Ohio (§ 3172w); R. I. (§ 59); Wis. (§ 1676-21).

The legal title to a note which is indorsed to a bank for collection and after protest is returned to such indorser is in the latter, who has the right to cancel his indorsement to the bank and his failure to exercise this right is immaterial, as his possession of the note is sufficient evidence of ownership of the note. *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 76 Conn. 126, 55 Atl. 604.

¹⁰³ *Boyd v. Beebe*, 64 W. Va. 216, 61 S. E. 304. In an action on the note, production by the payee is sufficient; need be no evidence he is holder. *Williams v. Holt*, 170 Mass. 351, 49 N. E. 654. In declaring on note in an action for debt it suffices, as to title, to aver that the defendant by it promised to pay the plaintiff the amount named in the note, no indorsement thereof being disclosed. *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882.

^{103a} *Craig v. Palo Alto Stock Farm (Idaho)* 102 Pac. 393.

BONA FIDE HOLDERS.

§ 167. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

Where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue;

Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course;

For the purpose of determining whether the transferee of an instrument payable to order and indorsed after transfer is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made;

3. That he took it in good faith;
4. That he took it for value;

Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time;

Every indorsement is deemed *prima facie* to have been based on a valuable consideration;

Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value;

Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien;

5. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it;

Where the transferee received notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him;

The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud;

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith;

6. That he took it in the usual or due course of business.

Paper must be complete and regular on face.

In considering the essential differences between negotiable and non-negotiable paper, we saw that it was one of the chief characteristics of a negotiable instrument that it is transferable to a holder who takes free from all prior equities affecting the paper.¹⁰⁴ In order that a holder may escape such equities, and become what

¹⁰⁴ This is also expressly provided by the negotiable instruments laws.

Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 57); Ariz. (§ 3360); Ill. (§ 57); Kan. (§ 64); Md. (§ 76); Mich. (§ 59); Neb. (§ 57); N. Y. (§ 96); Ohio (§ 3173 b); R. I. (§ 65); Wis. (§ 1676-27).

is termed a "bona fide" holder, or a "holder in due course," it is essential, first, that the paper he takes be complete and regular on its face.¹⁰⁵ Thus, where corporate notes were signed by all the necessary corporate officers but the president, one taking them as collateral had actual notice of the infirmity, and was not a bona fide holder.¹⁰⁶ The same rule applies to the purchaser of a check, payable to order, who obtains title without the indorsement of the payee. Such a purchaser takes "subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses."¹⁰⁷ If an instrument discloses usury,¹⁰⁸ or any other substantive irregularity,¹⁰⁹ the

¹⁰⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 52); Ariz. (§ 3355); Ill. (§ 52); Kan. (§ 59); Md. (§ 71); Mich. (§ 54); Neb. (§ 52); N. Y. (§ 91); Ohio (§ 3172 x); R. I. (§ 60); Wis. (§ 1676-22).

Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522. Is not bona fide holder where at time of receiving them they were blank as to amount, date and maturity. Hunter v. Allen, 127 App. Div. 572, 111 N. Y. Supp. 820. Request to delay presentment does not render transferee not bona fide holder. Matlock v. Scheuerman (Or.) 93 Pac. 823.

Authority to fill blanks, see ante, §§ 19, 20.

¹⁰⁶ Davis Sewing Mach. Co. v. Best, 105 N. Y. 59, 11 N. E. 146.

¹⁰⁷ Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180, 16 Am. St. Rep. 765, 7 L. R. A. 595

One who takes title to a promissory note, payable to the order of a person therein named, merely by the transfer of the indebtedness contained in the assignment of the mortgage securing such note, is not entitled to the benefits of the law merchant as to such note, but holds it subject to the equities that would affect it in the hands of his assignor. Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

¹⁰⁸ Metcalf v. Watkins, 1 Port. (Ala.) 57; Hamill v. Mason, 51 Ill. 488. But see Parker v. Plymell, 23 Kan. 402.

¹⁰⁹ Cronly v. Hall, 67 N. C. 9, 12 Am. Rep. 597; Stein v. Rheinstrom, 47 Minn. 476, 50 N. W. 827. But see Bank of Pittsburgh v. Neal, 63 U. S. (22 How.) 96, 16 Law. Ed. 248. Note made payable before recited date of note, see Miller v. Crayton, 3 Thomp. & C. 360. Instruments on their face non-negotiable, see Muse v. Dautzler, 85 Ala. 359, 5 So. 178; Robertson v. Cooper, 1 Ind. App. 78, 27 N. E. 104; First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604. See, also, Loomis v. Ruck, 56 N. Y. 462.

holder has actual notice of the infirmity, and is not a bona fide holder.

Must take before maturity without notice of any previous dishonor.

The holder, to be a holder in due course, must also become holder before the paper was overdue, and without notice that it had been previously dishonored, if such was the case.¹¹⁰

There is some conflict as to whether, under this section, the payee is a holder in due course. It has been held that the words "holder in due course" should be construed as applicable only to one who takes the instrument by negotiation from another who is a holder,¹¹¹ that is, one to whom, after completion and delivery, the instrument has been negotiated.¹¹² This changes what has heretofore been regarded as settled law,¹¹³ and has, apparently,

¹¹⁰Subdivision 2 of same sections of negotiable instruments laws as last above cited.

Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522; *Hodge v. Wallace*, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938. Indorsee after maturity takes subject to defenses. *King v. Mecklenburg*, 43 Colo. 316, 95 Pac. 951. See *First Nat. Bank v. Scott County Com'rs*, 14 Minn. 77, 100 Am. Dec. 194; *Kernohan v. Durham*, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41. See, also, *Hocking Valley Bank v. Barton*, 72 Pa. 110. Overdue interest does not destroy bona fide character of purchase made before maturity of the principal. *Kelly v. Whitney*, 45 Wis. 110, 39 Am. Rep. 697. Indorsement after maturity of paper transferred before maturity, see *Haskell v. Mitchell*, 53 Me. 468, 89 Am. Dec. 711; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18, 97 Am. Dec. 70.

An indorsee of several notes, some past due, and others not, is a holder in due course of those not due. *Boss v. Hewitt*, 15 Wis. 285. But see *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632.

¹¹¹*Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 124 Am. St. Rep. 275.

¹¹²*Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 124 Am. St. Rep. 275. Where defendants signed a note in blank and delivered it to a third party who filled in the blanks, making it payable to plaintiff, and delivered it to him, plaintiff was not a holder in due course. *Id.* But see *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

¹¹³*Chariton Plow Co. v. Davidson*, 16 Neb. 374, 20 N. W. 256; *Johnston Harvester Co. v. MacLean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

not been followed in all states.¹¹⁴ The rule as stated is in accord with the English view of the similar section in the English Bill of Exchange Act.¹¹⁵

Commercial paper is not overdue, within the meaning of this rule, if transferred on the day of maturity,¹¹⁶ or, where grace is allowed, on the last day of grace.¹¹⁷

Every negotiation is deemed *prima facie* to have been effected before the instrument was overdue, unless the indorsement bears date after the maturity of the instrument.¹¹⁸

Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the paper is overdue, and the holder is not a holder in due course.¹¹⁹ What is a reasonable time depends on the circumstances of the case.¹²⁰ A negotiation

¹¹⁴ Where payee took check of third person from debtor in payment of latter's debt. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

¹¹⁵ Bill of Exchange Act, § 20. *Herdman v. Wheeler*, 1 K. B. [1902] 361. See, also, *Lewis v. Clay*, 67 L. J. Q. B. 224.

¹¹⁶ *Wallach v. Bader*, 7 N. Y. St. Rep. 375.

¹¹⁷ *Johnson v. Glover*, 121 Ill. 238, 12 N. E. 257; *Continental Nat. Bank v. Townsend*, 87 N. Y. 8; *Crosby v. Grant*, 36 N. H. 273. But see *Pine v. Smith*, 77 Mass. (11 Gray) 38.

¹¹⁸ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 45); Ariz. (§ 3348); Ill. (§ 45); Kan. (§ 52); Md. (§ 64); Mich. (§ 47); Neb. (§ 45); N. Y. (§ 75); Ohio (§ 3172 q); R. I. (§ 53); Wis. (§ 1676-15).

¹¹⁹ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 53); Ariz. (§ 3356); Ill. (§ 53); Kan. (§ 60); Md. (§ 72); Mich. (§ 55); Neb. (§ 53); N. Y. (§ 92); Ohio (§ 3172 x); R. I. (§ 61); Wis. (§ 1676-23).

Poorman v. Mills, 39 Cal. 345, 2 Am. Rep. 451; *Stockbridge v. Damon*, 22 Mass. (5 Pick.) 223.

¹²⁰ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 193); Ariz. (§ 3498); Ill. (§ 192); Kan. (§ 4); Md. (§ 16); Mich. (§ 2); Neb. (§ 191); N. Y. (§ 4); Ohio (§ 3178 b); R. I. (§ 4); Wis. (§ 1675).

Next day sufficient. *Matlock v. Scheuerman* (Or.) 93 Pac. 823. Negotiation of foreign drafts within 5 days held within a reasonable time. *Singer Mfg. Co. v. Summer*, 143 N. C. 102, 55 S. E. 522.

of demand paper within seven days,¹²¹ or twenty-three days,¹²² or a month,¹²³ or even two years¹²⁴ from its issuance, has been held to be within a reasonable time. But on the other hand a negotiation three or four months,¹²⁵ or eight months,¹²⁶ or a year¹²⁷ after date, has been held not to be within a reasonable time.

In order to determine whether the transferee of an instrument payable to order and indorsed after transfer is a holder in due course, the negotiation takes effect of the time when the instrument is actually made.¹²⁸

Must take in good faith.

To be a holder in due course, one must also take in good faith.¹²⁹ The words "good faith," in this connection, refer only to the

¹²¹ *Thurston v. McKown*, 6 Mass. 428.

¹²² *Mitchell v. Catchings*, 23 Fed. 710.

¹²³ *Ranger v. Cory*, 42 Mass. (1 Metc.) 369.

¹²⁴ *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268.

¹²⁵ *Paine v. Central Vt. R. Co.*, 14 Fed. 269. See, also, *Herrick v. Woolverton*, 41 N. Y. 581, 1 Am. Rep. 461; *Stevens v. Brice*, 38 Mass. (21 Pick.) 193.

¹²⁶ *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 232; *American Bank v. Jenness*, 43 Mass. (2 Metc.) 288.

¹²⁷ *Hemmenway v. Stone*, 7 Mass. 58, 5 Am. Dec. 27.

¹²⁸ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 49); *Ariz.* (§ 3353); *Ill.* (§ 49); *Kan.* (§ 56); *Md.* (§ 68); *Mich.* (§ 51); *Neb.* (§ 49); *N. Y.* (§ 79); *Ohio* (§ 3172 v); *R. I.* (§ 57); *Wis.* (§ 1676-19).

¹²⁹ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 52); *Ariz.* (§ 3355); *Ill.* (§ 52); *Kan.* (§ 59); *Md.* (§ 71); *Mich.* (§ 54); *Neb.* (§ 52); *N. Y.* (§ 91); *Ohio* (§ 3172 x); *R. I.* (§ 60); *Wis.* (§ 1676-22).

Bank of Houston v. Day (Mo. App.) 122 S. W. 756; *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585, rvg. 117 App. Div. 130, 102 N. Y. Supp. 50; *Singer Mfg. Co. v. Summer*, 143 N. C. 102, 55 S. E. 522; *Weiss v. Rieser*, 62 Misc. 292, 114 N. Y. Supp. 983. Note obtained by duress. *Siegel v. Oehl*, 110 N. Y. Supp. 916; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Noble v. Carey*, 64 Hun, 635, 19 N. Y. Supp. 58; *Winkelman v. Choteau*, 78 Ill. 107; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W.

good faith of the indorsee or transferee.¹³⁰ Bad faith in taking commercial paper does not necessarily involve furtive motives, but it exists where one has knowledge of facts putting him on inquiry,¹³¹ and by inquiry he could have discovered the real situation.¹³² Neither the purchase of a note at a discount,¹³³ nor an indorsement without recourse,¹³⁴ is sufficient to put the purchaser on inquiry. Bad faith on the part of a purchaser may be shown by evidence of gross negligence,¹³⁵ and, when once shown, subjects him to all defenses available between prior parties.¹³⁶

Must take for value.

To be a holder in due course one must be a holder for value.¹³⁷ If value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become

849, 53 Am. Rep. 5. A transfer in consideration of other negotiable paper is for value. *Mickles v. Colvin*, 4 Barb. (N. Y.) 304. But, contra, see *Harrington v. Johnson*, 7 Colo. App. 483, 44 Pac. 368; *Bird v. Harville*, 33 Ga. 459 (due bill).

¹³⁰ *Haugan v. Sunwall*, 60 Minn. 367, 62 N. W. 398; *Helmer v. Krolick*, 36 Mich. 37.

¹³¹ *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585, rvg. 117 App. Div. 130, 102 N. Y. Supp. 50; *Royal Bank v. German-American Ins. Co.*, 58 Misc. 563, 109 N. Y. Supp. 822. Use of check payable to corporation to pay individual debt of officer held to put transferee on inquiry as to whether such use was authorized. *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585, rvg. 117 App. Div. 130, 102 N. Y. Supp. 50.

¹³² *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585, rvg. 117 App. Div. 130, 102 N. Y. Supp. 50.

¹³³ *Lassas v. McCarty*, 47 Or. 474, 84 Pac. 76.

¹³⁴ *Elgin City Banking Co. v. Hall* (Tenn.) 108 S. W. 1068.

¹³⁵ *Drew v. Wheelihan*, 75 Minn. 68, 77 N. W. 558. In this case, the question of bona fides was held to be a question for the jury.

¹³⁶ *Johnson v. Way*, 27 Ohio St. 374.

¹³⁷ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 52); Ariz. (§ 3355); Ill. (§ 52); Kan. (§ 59); Md. (§ 71); Mich. (§ 54); Neb. (§ 52); N. Y. (§ 91); Ohio (§ 3172 x); R. I. (§ 60); Wis. (§ 1676-22).

Siegel v. Oehl, 110 N. Y. Supp. 916; *Singer Mfg. Co. v. Summer*, 143 N. C. 102, 55 S. E. 522. Where check unsupported by a consideration was delivered to third party as a loan, it was without consideration and

such prior to that time.¹³⁸ Thus, an indorsee for value before maturity is not affected by a failure of consideration for the indorsement to his immediate indorser by the original payee,¹³⁹ and, if a party becomes a bona fide holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor that an additional consideration should proceed from him to the drawee.¹⁴⁰

We have seen that the original consideration for a negotiable instrument is presumed,¹⁴¹ and that a consideration for an indorsement is also presumed,¹⁴² and it follows, as of course, that a holder is presumed to have given value for the instrument,¹⁴³ and this presumption is not repelled merely by proof that, as between the immediate parties, the paper was without consideration.¹⁴⁴ The rule of the negotiable instrument laws, that an antecedent or pre-existing debt constitutes value, applies as well to the transfer as to the original execution of a negotiable instrument.¹⁴⁵ Under

he not a holder in due course. *Rosenthal v. Parsont*, 110 N. Y. Supp. 223. Surrendering notes and claims on third persons and paying balance in cash constitutes value. *Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149, 63 Am. St. Rep. 830, 38 L. R. A. 837.

¹³⁸ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 26); Ariz. (§ 3329); Ill. (§ 26); Kan. (§ 33); Md. (§ 45); Mich. (§ 28); Neb. (§ 26); N. Y. (§ 52); Ohio (§ 3171 x); R. I. (§ 34); Wis. (§ 1675-52).

A payee who, on receiving a note, paid the maker's indebtedness to a bank, is a holder for value. *Hermann's Ex'r v. Gregory* (Ky.) 115 S. W. 809.

¹³⁹ *Bookheim v. Alexander*, 64 Hun, 458, 19 N. Y. Supp. 776.

¹⁴⁰ *Heurtematte v. Morris*, 101 N. Y. 63, 54 Am. Rep. 657; *National Park Bank v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927.

¹⁴¹ See ante, § 59. *Riverside Bank v. Woodhaven Junction Land Co.*, 34 App. Div. 359, 54 N. Y. Supp. 266.

¹⁴² See ante, § 125.

¹⁴³ *Owens v. Snell*, 29 Or. 483; *Page's Adm'rs v. Bank of Alexandria*, 20 U. S. (7 Wheat.) 35, 5 Law. Ed. 209; *Joveshof v. Rockney*, 58 Misc. 559, 109 N. Y. Supp. 818.

¹⁴⁴ See *Joveshof v. Rockney*, 58 Misc. 559, 109 N. Y. Supp. 818.

¹⁴⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 25); Ariz. (§ 3328); Ill.

this provision the indorsee of a note taken as collateral for a pre-existing debt takes free from equities between the original parties,¹⁴⁶ and a person taking a note before maturity without notice, who credits the amount thereof on an antecedent debt due to him, is a bona fide holder.¹⁴⁷ Under the Wisconsin negotiable instruments laws, however, "the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery by the maker, does not constitute value."¹⁴⁸ One taking negotiable paper in absolute payment of a pre-existing debt is a purchaser for value, though he did not pay the full face value of the instrument.¹⁴⁹ In amplification of the rule that an antecedent or pre-existing debt constitutes value¹⁵⁰ is the rule that a holder having a lien on the instrument, arising either from contract or by implication of law, is a holder for value to the extent of his lien.¹⁵¹ While this rule limits the recovery by the

(§ 25); Kan. (§ 32); Md. (§ 44); Mich. (§ 27); Neb. (§ 25); N. Y. (§ 51); Ohio (§ 3171 x); R. I. (§ 33); Wis. (§ 1675-51).

In *re Hopper-Morgan Co.*, 154 Fed. 249; *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522; *Hermann's Ex'r v. Gregory* (Ky.) 115 S. W. 809; *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885; *Rosemond v. Graham*, 54 Minn. 324, 40 Am. St. Rep. 336; *Oates v. National Bank*, 100 U. S. 239, 25 Law. Ed. 580; *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 Law. Ed. 166. See ante, chapter V.

¹⁴⁶ *Brewster v. Shrader*, 26 Misc. 480, 57 N. Y. Supp. 606. The court in this case takes occasion to review at some length the history of the steps leading up to the adoption of the negotiable instruments laws. In *re Hopper-Morgan Co.*, 154 Fed. 249; *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522. See, also, *Whiteside v. First Nat. Bank* (Tenn. Ch.) 47 S. W. 1108; *Murphy v. Gumaer*, 12 Colo. App. 472, 55 Pac. 951.

¹⁴⁷ *Rosenwald v. Goldstein*, 27 Misc. 827, 57 N. Y. Supp. 224.

¹⁴⁸ *Negotiable Inst. Law*, § 1675--51.

¹⁴⁹ *Heath v. Silverthorn Lead Mining & Smelting Co.*, 39 Wis. 146.

¹⁵⁰ See ante, § 61.

¹⁵¹ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev.; N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 27); Ariz. (§ 3330); Ill. (§ 27); Kan. (§ 34); Md. (§ 46); Mich. (§ 29); Neb. (§ 27); N. Y. (§ 53); Ohio (§ 3171 z); R. I. (§ 35); Wis. (§ 1675-53).

One is entitled to protection as a bona fide holder for value who has taken the note as collateral security for future advances subsequently

lienholder himself to the amount of the debt secured,¹⁵² it does not limit the amount recoverable by a subsequent bona fide holder; but the latter, as will be seen later, may recover the face value of the instrument, though he paid less.¹⁵³

Value may also be any consideration which will support a simple contract.¹⁵⁴ A transferee taking collateral by way of substitution for other collateral surrendered becomes a holder for value,¹⁵⁵ as does one whose right is based on an exchange of commercial paper.¹⁵⁶ But a holder for value delivering the note to his agent for a specific purpose does not ordinarily constitute a surrender of the lawful possession of the note as a holder for value.¹⁵⁷ It follows that a bank to whom is forwarded a draft for collection only does not thereby become a holder for value,¹⁵⁸ nor does the mere existence of an indebtedness of the payee to the bank constitute it holder for value, the draft being delivered to the payee for collection only.¹⁵⁹

An accommodation party is liable on the instrument to a holder for value, though such holder, at the time of taking the instrument, knew him to be only an accommodation party.¹⁶⁰ This rule

actually made. *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88. See, also, *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822.

¹⁵² *Messick v. Alderman*, 77 Conn. 634, 60 Atl. 109; *Hatcher v. Independence Nat. Bank*, 79 Ga. 547, 5 S. E. 111; *Handy v. Sibley*, 46 Ohio St. 9, 17 N. E. 329; *Winship v. Merchants' Nat. Bank*, 42 Ark. 22. The rule applies to accommodation paper. *Continental Nat. Bank v. Bell*, 125 N. Y. 38, 22 N. E. 1070; *Handy v. Sibley*, 46 Ohio St. 9.

¹⁵³ See post, § 172, and cases cited.

¹⁵⁴ *Matlock v. Scheuerman* (Or.) 93 Pac. 823.

¹⁵⁵ *Voss v. Chamberlain*, 139 Iowa, 569, 117 N. W. 269.

¹⁵⁶ *Matlock v. Scheuerman* (Or.) 93 Pac. 823.

¹⁵⁷ *Voss v. Chamberlain*, 139 Iowa, 569, 117 N. W. 269.

¹⁵⁸ *Bank of America v. Waydell*, 187 N. Y. 115, 79 N. E. 857, afg. 103 App. Div. 25, 92 N. Y. Supp. 666.

¹⁵⁹ *Bank of America v. Waydell*, 187 N. Y. 115, 79 N. E. 857, afg. 103 App. Div. 25, 92 N. Y. Supp. 666.

¹⁶⁰ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 29); Ariz. (§ 3332); Ill. (§ 29); Kan. (§ 36); Md. (§ 48); Mich. (§ 31); Neb. (§ 29); N. Y. (§ 55); Ohio (§ 3172 a); R. I. (§ 37); Wis. (§ 1675-55).

of the negotiable instruments laws is declaratory of the law merchants.¹⁶¹

The transfer of negotiable paper to a bank in consideration of credit upon its books, which credit is not absorbed by an antecedent indebtedness, or exhausted by subsequent withdrawals is not a purchase in the ordinary sense of the term,¹⁶² but the rule is otherwise where the credit to the seller of the note is given by the purchaser, not on its own books, but in a different, solvent bank,¹⁶³ or where the bank holds a note of the payee due on the day the instrument is received and pays the same by application of the discount,¹⁶⁴ or where it assumes a legal obligation to another on the faith of the credit,¹⁶⁵ or allows the account upon which it was credited to become overdrawn, even though on subsequent dates, including the date of maturity of the note, the account had a balance exceeding the amount of the note.¹⁶⁶ So, too, where the

Citizens' Nat. Bank v. Lillenthal, 40 App. Div. 609, 57 N. Y. Supp. 567; *White v. Savage*, 48 Or. 604, 87 Pac. 1040; *Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149, 63 Am. St. Rep. 830, 38 L. R. A. 837.

See ante, chapter V, § 65.

¹⁶¹ *Hodges v. Nash*, 43 Ill. App. 638; *Tourtelot v. Reed*, 62 Minn. 384, 64 N. W. 928; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620; *Holland Trust Co. v. Waddell*, 75 Hun, 104, 26 N. Y. Supp. 980.

¹⁶² *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265; *Albany County Bank v. People's Ice Co.*, 92 App. Div. 47, 86 N. Y. Supp. 773; *Consolidation Nat. Bank v. Kirkland*, 99 App. Div. 121, 91 N. Y. Supp. 353. The law seems to be settled that, when a bank simply discounts a note and credits the amount thereof on the indorser's account without paying to him any value for it, it is not enough to constitute such bank a prima facie purchaser for value of the note. *Elgin City Banking Co. v. Hall* (Tenn.) 108 S. W. 1068, citing *Selover*, p. 217. Mere crediting to a depositor's account on the books of a bank, of the amount of a check drawn on another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course. *Citizens' State Bank v. Cowles*, 180 N. Y. 340, 73 N. E. 33, 105 Am. St. Rep. 765, rev. 89 App. Div. 281, 86 N. Y. Supp. 38. True of a mere "conditional credit." *Commercial Nat. Bank v. Citizens' State Bank*, 132 Iowa, 706, 109 N. W. 198.

¹⁶³ *Elgin City Banking Co. v. Hall* (Tenn.) 108 S. W. 1068.

¹⁶⁴ *Wallabout Bank v. Peyton*, 123 App. Div. 727, 108 N. Y. Supp. 42.

¹⁶⁵ *Montrose Sav. Bank v. Claussen*, 137 Iowa, 73, 114 N. W. 547.

¹⁶⁶ *Northfield Nat. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451; *Dreil-*

payee of a check on another bank indorses and deposits the same with his bank, receives credit of the amount as cash in his general account, to be checked against, with nothing to qualify the effect of such acts, the bank becomes the owner of the check and not a mere agent to collect the same for the payee.¹⁶⁷ But where the avails of a discount are applied to an existing indebtedness, the bank must show an agreement that they should be applied in payment and extinguishment thereof.¹⁶⁸

Must take without notice of infirmities or defects.

A holder in due course must have taken without notice, at the time of the negotiation, of any infirmity in the instrument or defect in the title of the person negotiating it.¹⁶⁹ If, however, the transferee receives notice of any such infirmity or defect before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the

ling v. First Nat. Bank, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126, citing Fox v. Bank of Kansas City, 30 Kan. 441, 1 Pac. 789, and Mann v. Nat. Bank, 30 Kan. 412, 1 Pac. 579.

¹⁶⁷ Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 109 Am. St. Rep. 925, 68 L. R. A. 964.

¹⁶⁸ Consolidation Nat. Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. Supp. 353.

¹⁶⁹ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 52); Ariz. (§ 3355); Ill. (§ 52); Kan. (§ 59; Md. (§ 71); Mich. (§ 54); Neb. (§ 52); N. Y. (§ 91); Ohio (§ 3172 x); R. I. (§ 60); Wis. (§ 1676-22).

First Nat. Bank of Wilkes-Barre v. Barnum, 160 Fed. 245; Siegel v. Oehl, 110 N. Y. Supp. 916. Notice acquired after transfer does not affect bona fides. Hoge v. Lansing, 35 N. Y. 136; Richardson v. Monroe, 85 Iowa, 359, 52 N. W. 339, 39 Am. St. Rep. 301. As to notice acquired after transfer, but before consideration is paid, see Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 37 Law. Ed. 1063. On rights of bona fide purchaser of stolen paper, see Whiteside v. First Nat. Bank (Tenn. Ch.) 47 S. W. 1108; Kuhns v. Gettysburg Nat. Bank, 68 Pa. 445; Dinsmore v. Duncan, 57 N. Y. 573, 13 Am. Rep. 534; Hall v. Wilson, 16 Barb. (N. Y.) 548; Franklin Sav. Inst. v. Heinsman, 1 Mo. App. 336; Wheeler v. Guild, 37 Mass. (20 Pick.) 545, 32 Am. Dec. 231.

amount theretofore paid by him.¹⁷⁰ This latter section is merely declaratory of the law merchant.¹⁷¹

When title of person negotiating is defective.

The title of the person negotiating is defective, within the meaning of the act, if he obtained the instrument or any signature thereto by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under circumstances amounting to fraud.¹⁷² The Wisconsin negotiable instruments law adds that the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the character of the instrument, and could not have obtained such knowledge by the use of ordinary care.¹⁷³ As stated, the title of a person who

¹⁷⁰ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 54); Ariz. (§ 3357); Ill. (§ 54); Kan. (§ 61); Md. (§ 73); Mich. (§ 56); Neb. (§ 54); N. Y. (§ 93); Ohio (§ 3172 z); R. I. (§ 62); Wis. (§ 1676-24).

Bank of Morehead v. Hernig, 220 Pa. 224, 69 Atl. 679; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Hubbard v. Chapin, 84 Mass. (2 Allen) 328; Dresser v. Missouri & I. R. Const. Co., 93 U. S. 92, 23 Law. Ed. 815.

¹⁷¹ Albany County Bank v. People's Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773.

¹⁷² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 55); Ariz. (§ 3358); Ill. (§ 55); Kan. (§ 62); Md. (§ 74); Mich. (§ 57); Neb. (§ 55); N. Y. (§ 94); Ohio (§ 3173); R. I. (§ 63); Wis. (§ 1676-25).

Bank of Morehead v. Hernig, 220 Pa. 224, 69 Atl. 679.

Fraud. Packard v. Figliuolo, 114 N. Y. Supp. 753; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Brook v. Teague, 52 Kan. 119, 34 Pac. 347; Heist v. Hart, 73 Pa. 286. Usury. Keene v. Behan, 40 Wash. 505, 82 Pac. 884.

¹⁷³ Negotiable Inst. Law, § 1676-25. Signature obtained by misrepresentation as to the nature of the instrument, without negligence on the part of the signer, does not create a valid obligation, even in the hands of a bona fide holder. Auten v. Gruner, 90 Ill. 300, 33 Am. Rep. 54; Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, 60 Am. St. Rep. 184; Kalamazoo Nat. Bank v. Clark, 52 Mo. App. 593; Griffiths v. Kellogg, 39 Wis. 290, 20 Am. Rep. 48; Willard v. Nelson, 35 Neb. 651, 53 N. W. 572,

negotiates commercial paper is defective when he has obtained any signature thereto by fraud,¹⁷⁴ and if the party so defrauded be relieved from liability thereon, then such fraud makes a paper voidable by all the other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it.¹⁷⁵ This conclusion is based on the ground that when several persons assume such an obligation, it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if, through the fraud of the person holding it, such equality of burden is disturbed and increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it,¹⁷⁶ and it would seem that the express terms of the act would compel the result here reached. This being the ascertained meaning of the section proper, we proceed to consider and determine the meaning of the following and concluding clause in the Wisconsin act. In terms it expresses the rule of law recognized in those decisions, which, prior to its enactment, held that when a signature to a negotiable instrument is obtained by falsely and fraudulently misrepresenting its character, and the person signing it could not have obtained knowledge of the falsity and fraud, by the use of ordinary care, the title to the instrument is absolutely void as to such signer.¹⁷⁷ The words of the statute, "the title of such person is absolutely void when such instrument or signature was so procured from a person," through misrepresenting its character and from one who was not guilty of a want of ordinary care, must be read in connection with the preceding clause, declaring a person's title defective "when he obtains the instrument or any signature thereto" in the prohibited

37 Am. St. Rep. 455. Aliter, if signer was negligent. *Boynton v. McDaniel*, 97 Ga. 400, 23 S. E. 824; *Ward v. Johnson*, 51 Minn. 480, 53 N. W. 766, 38 Am. St. Rep. 515; *Chapman v. Rose*, 56 N. Y. 137, 15 Am. Rep. 401.

¹⁷⁴ See ante, note 172.

¹⁷⁵ *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192.

¹⁷⁶ *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192; *Aukland v. Arnold*, 131 Wis. 64, 111 N. W. 212.

¹⁷⁷ *Aukland v. Arnold*, 131 Wis. 64, 111 N. W. 212.

manner.¹⁷⁸ These phases, in their connection, embody the idea that, if the instrument or any signature thereto is obtained in one of the prohibited ways covered by the first and second clauses, then the title to the instrument is, respectively, defective or absolutely void.¹⁷⁹ Failure or want of consideration does not constitute a defective title.¹⁸⁰

What constitutes notice of defects.

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it was negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.¹⁸¹ A mere suspicion of infirmity will not constitute notice.¹⁸² That the maker

¹⁷⁸Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212.

¹⁷⁹Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212. Where note was signed by several makers, and the signature of one is obtained by fraudulent representations as to the character of the instrument, and he could not have obtained knowledge of its character by the use of ordinary care, the note was void as to all the makers. Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212.

¹⁸⁰Holder need not first show himself a holder in due course, the burden of showing want of consideration and notice thereof by the indorsee being upon the maker. Cole Banking Co. v. Sinclair, 34 Utah, 459, 98 Pac. 411.

¹⁸¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 56); Ariz. (§ 3359); Ill. (§ 56); Kan. (§ 63); Md. (§ 75); Mich. (§ 58); Neb. (§ 56); N. Y. (§ 95); Ohio (§ 3173 a); R. I. (§ 64); Wis. (§ 1676-26).

Arnd v. Aylesworth (Iowa) 123 N. W. 1000. Statute does not relax former Nebraska rule. Benton v. Sikyta (Neb.) 122 N. W. 61.

See Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; American Exch. Nat. Bank v. New York Belting & Packing Co., 148 N. Y. 698, 43 N. E. 168.

¹⁸²Valley Sav. Bank v. Mercer, 97 Md. 458; Kelly v. Whitney, 45 Wis. 110, 30 Am. Rep. 697; Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373; Second Nat. Bank v. Morgan, 165 Pa. St. 199, 30 Atl. 957, 44 Am. St. Rep. 652.

Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103, 111 Am. St. Rep. 717, 2 L. R. A. (N. S.) 299; Wedge Mines Co. v. Denver Nat.

of a note indorsed in blank by the payee is the bearer and discounts it does not render the bank a holder in bad faith, it having no actual knowledge.¹⁸³ Bad faith, i. e., fraud, not merely suspicious circumstances, must be brought home to a holder for value whose rights accrued before maturity in order to defeat his recovery on a negotiable note upon the ground of fraud in its inception or between the parties to it.¹⁸⁴ Gross negligence is evidence from which bad faith may be inferred, but it does not of itself constitute bad faith in the law.¹⁸⁵ If the facts shown have any fair tendency to show bad faith, the question is one of fact.¹⁸⁶

Bank, 19 Colo. App. 182, 73 Pac. 873; *Kavanagh v. Bank of America*, 239 Ill. 404, 88 N. E. 171; *Jefferson Bank of St. Louis v. Chapman-White-Lyons Co. (Tenn.)* 123 S. W. 641.

It must be remembered that a holder in good faith and for value is not chargeable with mere inferences which might be drawn from the nature of the transaction. *Johnson v. Buffalo Center State Bank*, 134 Iowa, 731, 112 N. W. 165. That certificate of deposit bore 8 per cent. interest and that bank transferred it, instead of presenting it for payment, held insufficient to impute notice of defect to holder. *Id.* That the evidence only tends to show that the purchaser was put on inquiry is insufficient. *Elgin City Banking Co. v. Hall (Tenn.)* 108 S. W. 1068. But the fact that the maker of a note procures its discount for his own benefit is notice that the indorsement was merely for his accommodation. *National Park Bank v. German Am. Mut. W. & S. Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; *Mechanics' Bank v. Barnes*, 86 Mich. 632, 49 N. W. 475; *National Park Bank v. Remsen*, 43 Fed. 226. The fact that the payee of a note, made by a corporation, is a director of such corporation, is not notice to a transferee of any infirmity of the note, nor is it sufficient to put him on inquiry concerning the circumstances under which the note was issued. The rule applicable to notes made by officers of a corporation to their own order and used to pay their individual obligations has no application to notes made by duly authorized officers payable to a director. *Orr v. South Amboy Terra Cotta Co.*, 113 App. Div. 103, 98 N. Y. Supp. 1026. Indorsee of check not put on inquiry by negotiation before its date. *Albert v. Hoffman*, 64 Misc. 87, 117 N. Y. Supp. 1043.

¹⁸³ *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959.

¹⁸⁴ *Rice v. Barrington*, 75 N. J. Law, 806, 70 Atl. 169.

¹⁸⁵ *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 848.

¹⁸⁶ *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858; *Matlock v. Scheuerman (Or.)* 93 Pac. 823.

Notice to an agent is ordinarily considered notice to his principal,¹⁸⁷ and notice to a partner is notice to the firm.¹⁸⁸

Must take in due course of business.

The uniform practice of merchants in transferring credits, represented by commercial paper, has given rise to certain rules governing the method of transferring such paper, which method has come to constitute the ordinary or usual course of business, a departure from which is equivalent to a notice of equities, and subjects the negotiable instrument to defenses in the hands of a holder who has acquired a right thereto in any other manner.¹⁸⁹ It follows that in addition to the above essentials of a taking in due course, it is usually stated that to be a bona fide holder one must take in the usual or due course of business.¹⁹⁰ Commercial

¹⁸⁷ *Merrill v. Packer*, 80 Iowa, 542, 45 N. W. 1076; *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632. Contra, see *First Nat. Bank v. Babbidge*, 160 Mass. 563, 36 N. E. 462 (notice to president of bank). See, also, *Union Square Bank v. Hellerson*, 90 Hun, 262, 35 N. Y. Supp. 871 (notice to attorney). Knowledge of the president of a bank is not notice to the bank unless he receives it in his official capacity. *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710. Notice to cashier of bank notice to bank. *Hunter v. Allen*, 127 App. Div. 572, 111 N. Y. Supp. 820.

¹⁸⁸ *Calvert v. Dimon*, 19 Colo. 17, 34 Pac. 170; *Cunningham v. Woodbridge*, 76 Ga. 302; *King v. Nichols*, 138 Mass. 18.

¹⁸⁹ Transferee of note payable to order and transferred without indorsement takes subject to all equities existing in favor of maker. *First Nat. Bank v. McCullough*, 50 Or. 508, 93 Pac. 366, 126 Am. St. Rep. 758, 17 L. R. A. (N. S.) 1105.

"If one purchases an accommodation note for cash and sells it to a bona fide purchaser in exchange for the purchaser's own note, the purchaser may be found to be a holder in due course." *Mehlinger v. Hariman*, 185 Mass. 245, 70 N. E. 51. General surety for payee and guarantor of a note redeeming the note from a transferee in pursuance to his general suretyship held not a purchaser in usual course of business. *Rockefeller v. Ringle*, 47 Kan. 515, 94 Pac. 810, 15 L. R. A. (N. S.) 737.

¹⁹⁰ The Wisconsin negotiable instruments law expressly adds this requisite (§ 1676-22, subd. 5). *Siegel v. Oehl*, 110 N. Y. Supp. 916.

As to what constitutes a taking in due course of business, see *Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308; *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 898, following *Fredin v. Richards*, 61 Minn. 490, 63 N. W.

paper may be said to be received in the usual course of business when there is an indorsement and delivery for value under such circumstances that a business man of ordinary intelligence and capacity would give his goods and credit for it when offered for the purpose for which the instrument was transferred.¹⁹¹ The negotiable instruments laws, however, consider one a bona fide purchaser when his purchase has the elements set out in the preceding four sections, as such elements, taken together, constitute a taking in due course of business.

PRESUMPTIONS AND BURDEN OF PROOF.

§ 168. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course.

Exception.—But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Every holder is presumed to be a holder in due course.¹⁹² When it is shown, however, that the title of any person who has nego-

1031; *Railway Equip. & Pub. Co. v. Lincoln Nat. Bank*, 82 Hun, 8, 31 N. Y. Supp. 44; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Burnham v. Merchants' Exch. Bank*, 92 Wis. 277, 66 N. W. 510.

¹⁹¹ *Matlock v. Scheuerman* (Or.) 93 Pac. 823.

¹⁹² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 59); Ariz. (§ 3362); Ill. (§ 59); Kan. (§ 66); Md. (§ 78); Mich. (§ 61); Neb. (§ 59); N. Y. (§ 98); Ohio (§ 3173 d); R. I. (§ 67); Wis. (§ 1676-29).

Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. 873; *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847; *Cox v. Cline*, 139 Iowa, 128, 117 N. W.

tiated the instrument was defective, the burden is on the holder to prove that he, or some one under whom he claims, acquired the title as a holder in due course.¹⁹³ The purpose of the law in exacting inquiry under such circumstances is to see whether the apparent situation is the actual situation, or, in other words, to

48; *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614; *McCornick v. Swem* (Utah) 102 Pac. 626; *Champion Empire Min. Co. v. Bird*, 7 Colo. App. 523, 44 Pac. 764; *Farmers' Bank v. Brooke*, 40 Md. 249; *Hall v. First Nat. Bank*, 133 Ill. 234, 24 N. E. 546; *Estabrook v. Boyle*, 83 Mass. (1 Allen) 412; *Langley v. Wadsworth*, 99 N. Y. 61, 1 N. E. 106; *Tredwell v. Blount*, 86 N. C. 33; *Wayland University v. Boorman*, 56 Wis. 657, 14 N. W. 819; *Joy v. Diefendorf*, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484, holding that where the maker establishes fraud, plaintiff must prove that he is a bona fide holder. Presumption in favor of bona fide holder, that instrument was delivered, see ante, § 29.

¹⁹³ Same sections of negotiable instruments laws as last above cited.

Cook v. American Tubing & Webbing Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; *Parsons v. Utica Cement Mfg. Co.*, 80 Conn. 58, 66 Atl. 1024; *Bank of Morehead v. Hernig*, 220 Pa. 224, 69 Atl. 679; *Mitchell v. Baldwin*, 88 App. Div. 265, 84 N. Y. Supp. 1043; *German-American Bank v. Cunningham*, 97 App. Div. 244, 89 N. Y. Supp. 836; *Consolidation Nat. Bank v. Kirkland*, 99 App. Div. 121, 91 N. Y. Supp. 353; *Packard v. Figlinolo*, 114 N. Y. Supp. 753; *J. Regester's Sons Co. v. Reed*, 185 Mass. 226, 70 N. E. 53; *Demelman v. Brazier*, 198 Mass. 458, 84 N. E. 856; *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192; *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614; *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265; *City Deposit Bank v. Green*, 138 Iowa, 156, 115 N. W. 893; *Cox v. Cline*, 139 Iowa, 128, 117 N. W. 48; *City Nat. Bank v. Jordan*, 139 Iowa, 499, 117 N. W. 758; *American Nat. Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738; *Elgin City Banking Co. v. Hall* (Tenn.) 108 S. W. 1068; *Singer Mfg. Co. v. Summer*, 143 N. C. 102, 55 S. E. 522; *Chambers v. Falkner*, 65 Ala. 448; *Schulthers v. Sellers*, 223 Pa. 513, 72 Atl. 887; *Beck v. Maller*, 131 App. Div. 243, 115 N. Y. Supp. 596; *Iowa Nat. Bank v. Carter* (Iowa) 123 N. W. 237; *Arnd v. Aylesworth* (Iowa) 123 N. W. 1000; *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850. The last case cited holds that where the defense pleaded is a failure of consideration, or any other matter arising after the execution of the note, the transaction out of which the note arose being fair and lawful, the defendant has the onus of the issue to establish that the holder of the note took it with notice of the defense. Illegality of consideration being shown the burden is on the holder to show his bona fide character. *Matlock v. Scheuerman* (Or.) 93 Pac. 823. *Usury. Keene v. Behan*, 40 Wash. 505, 82 Pac. 884. Instruction that burden is on the holder to show "that some person under whom he claims acquired

learn whether facts exist to rebut the presumption.¹⁹⁴ The object is not to discover negative facts, or such as would not arouse suspicion, but positive facts which would allay the suspicion already aroused.¹⁹⁵ The law, however, goes further than this in order to promote the transfer of commercial paper, for it is settled that if no inquiry is in fact made to dispel the presumption, but reasonable inquiry would have led to the discovery of facts which would have dispelled it, the purchaser of the paper is entitled to the benefit thereof the same as if he had learned them by proper investigation.¹⁹⁶ This benefit, however, carries with it the burden of responsibility for such unfavorable facts as reasonable inquiry would have discovered in relation to the defect that made inquiry necessary.¹⁹⁷ The rule stated does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.¹⁹⁸ The corresponding provision of the Eng-

title in good faith" is erroneous. *Hawkins v. Young*, 137 Iowa, 281, 114 N. W. 1041. Proof that a full consideration was paid for the paper prima facie establishes that it was taken in due course. *Hodge v. Smith*, 130 Wis., 326, 110 N. W. 192. But where the evidence merely discloses a placing of the consideration to the credit of the seller on the books of the purchaser, the burden is on the latter to show that the debt was in fact paid. *Id.* Statute is declaratory of common law. *Parsons v. Utica Cement Co. (Conn.)* 73 Atl. 785. Fraud in procurement of note. *Ireland v. Scharpenberg (Wash.)* 103 Pac. 801.

¹⁹⁴*Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585, rvg. 117 App. Div. 130, 102 N. Y. Supp. 50. This involves something more than the mere presumption arising from an indorsement regular in form. *O'Connor v. Kleiman (Iowa)* 121 N. W. 1088.

¹⁹⁵*Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585, rvg. 117 App. Div. 130, 102 N. Y. Supp. 50.

¹⁹⁶*Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585, rvg. 117 App. Div. 130, 102 N. Y. Supp. 50.

¹⁹⁷*Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585, rvg. 117 App. Div. 130, 102 N. Y. Supp. 50.

¹⁹⁸Same sections of negotiable instruments laws as last above cited.

Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269. The result of this is that the defendant cannot overcome the presumption that the holder is one in due course by showing such a subsequent defect; but the burden still remains

lish Bills of Exchange Act of 1882¹⁹⁹ is: "Every holder of a bill is prima facie deemed to be a holder in due course; but if, in an action on a bill, it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." This provision has been construed to mean that, when fraud is proved, the burden is on the holder to prove both a valuable consideration and a taking in good faith without notice of the fraud.²⁰⁰

In a suit by a subsequent holder, the proper method of procedure is for the plaintiff to produce the note, prove the indorsements and the making of the note, and rest, thereby establishing a prima facie case and for the time being his own title and right to recover, and the defendant's liability.²⁰¹ The defendant should then be permitted to prove his defense;²⁰² and it is then necessary for the plaintiff to prove that he is a bona fide holder of the note for value before maturity.²⁰³

on him to show that the holder is not a holder in due course. *Id.* Fraud where note was negotiated in violation of agreement under which it was given. *German American Bank v. Cunningham*, 97 App. Div. 244, 89 N. Y. Supp. 836.

¹⁹⁹ 45 & 46 Vict. c. 61, § 30, subd. 2.

²⁰⁰ *Tatam v. Haslar*, 23 Q. B. Div. 345.

²⁰¹ *Siegel v. Oehl*, 110 N. Y. Supp. 916. While, as stated, every holder is deemed prima facie a holder in due course, still the uniform practice in suits by the indorsee against the maker is to aver that the plaintiff took the note before maturity and is a bona fide holder for value. Failing so to do, an answer averring that the note was taken after notice of the payee's defective title, and that little or no consideration passed, is sufficient to put the plaintiff on proof of the bona fides of the transaction. *Bank of Moorehead v. Hernig*, 220 Pa. 224, 69 Atl. 679.

²⁰² *Duress. Siegel v. Oehl*, 110 N. Y. Supp. 916.

²⁰³ *Siegel v. Oehl*, 110 N. Y. Supp. 916.

DEFENSES AVAILABLE AGAINST HOLDER IN DUE COURSE.

§ 169. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves.

The rule that a holder in due course takes free from all equities existing between prior parties has already been considered, generally, in treating of the essential differences between negotiable and non-negotiable paper, and is of such uniform application that it hardly requires the citation of any authorities to sustain it.²⁰⁴ This rule is essentially one of public policy.²⁰⁵ While, except as is expressly provided in the act, an innocent holder may enforce payment for the full amount free from defenses available between the original parties,²⁰⁶ still it is advisable at this point to examine more particularly into the scope of the term "equities," and to discover what legal defenses may be interposed against a holder in due course.

It is clear that defects appearing on the face of the paper at the time of its transfer to the holder are not "equities" which he can escape;²⁰⁷ nor are matters which, though not apparent on the face of the paper, render the contract void ab initio, such as illegality of consideration in cases where, by statute, the illegality

²⁰⁴*McFarland v. State Bank of Chase*, 7 Kan. App. 722, 52 Pac. 110; *Knight v. Tinney*, 59 Neb. 274, 80 N. W. 912; *Pettee v. Prout*, 69 Mass. (3 Gray) 502, 63 Am. Dec. 778; *Bostwick v. Dodge*, 1 Doug. 413, 41 Am. Dec. 584; *Chase Nat. Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605; *Genesee County Sav. Bank v. Kindt*, 7 Wyo. 321, 51 Pac. 878; *Little v. Dunlap*, 44 N. C. (Busb. Law) 40.

²⁰⁵*Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 111 Am. St. Rep. 717, 2 L. R. A. (N. S.) 299.

²⁰⁶May enforce payment of lightning rod note though it did not contain statement of such fact, as required by Laws 1903, p. 723, c. 438. *Arnd v. Sjoblom*, 131 Wis. 642, 111 N. W. 666. Insurance premium note given for less than full sum. *Gray v. Boyle* (Wash.) 104 Pac. 828.

²⁰⁷See ante, § 167.

renders the contract void,²⁰⁸ incapacity of prior parties,²⁰⁹ and want of authority in the officers of a public corporation to execute negotiable instruments.²¹⁰ Ordinarily, however, matters not apparent on the face of the paper, such as unindorsed payments,²¹¹ set-offs and counterclaims,²¹² mistake,²¹³ fraud,²¹⁴ duress,²¹⁵

²⁰⁸*Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413; *Bayley v. Taber*, 5 Mass. 286, 4 Am. Dec. 57; *Glen v. Farmers' Bank*, 70 N. C. 191; *Union Nat. Bank v. Brown*, 101 Ky. 354, 19 Ky. Law Rep. 540, 41 S. W. 273; *International Bank v. Vankirk*, 39 Ill. App. 23; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 705; *Swinney v. Edwards*, 8 Wyo. 54, 55 Pac. 306, 80 Am. St. Rep. 916. Stallion note. *Quiggle v. Herman*, 131 Wis. 379, 111 N. W. 479. Statute declaring gambling notes void unenforceable in hands of bona fide holders. *Alexander & Co. v. Hazelrigg* 123 Ky., 677, 29 Ky. Law Rep. 1212, 97 S. W. 353.

Rule is otherwise where illegality results from common law. Note based on gambling consideration good in hands of bona fide holder. *Wirt v. Stubblefield*, 17 App. D. C. 283.

²⁰⁹*Anglo-California Bank v. Ames*, 27 Fed. 727; *Voreis v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45; *Johnson v. Sutherland*, 39 Mich. 579; *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

Title passes under indorsement or assignment by corporation or infant notwithstanding want of capacity. See *supra*, note 80.

²¹⁰*Eastman v. District Tp. of Lyon*, 40 Iowa, 438; *Halstead v. New York*, 5 Barb. (N. Y.) 218; *School Directors v. Fogleman*, 76 Ill. 190.

²¹¹*Bank of University v. Tuck*, 96 Ga. 456; *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Harpending v. Gray*, 76 Hun, 351, 27 N. Y. Supp. 762. See, also, *Swope v. Ross*, 40 Pa. 186, 80 Am. Dec. 567.

²¹²*Way v. Lamb*, 15 Iowa, 79; *United States Nat. Bank v. McNair*, 116 N. C. 550, 21 S. E. 389; *Carothers v. Richards*, 17 Ky. Law Rep. 42, 30 S. W. 211; *McGrath v. Pitkin*, 26 Misc. 862, 56 N. Y. Supp. 398; *Robinson v. Lyman*, 10 Conn. 30, 25 Am. Dec. 52.

²¹³*Steadwell v. Morris*, 61 Ga. 97; *Huston v. Young*, 33 Me. 85.

²¹⁴*Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 So. 522; *Holeman v. Hobson*, 27 Tenn. (8 Humph.) 127; *Cristy v. Campau*, 107 Mich. 172, 65 N. W. 12 (false representations); *Grant v. Walsh*, 145 N. Y. 302, 40 N. E. 209, 45 Am. St. Rep. 626; *Ormsbee v. Howe*, 54 Vt. 182, 41 Am. Rep. 841; *Holcomb v. Wyckoff*, 35 N. J. Law, 35, 10 Am. Rep. 219. So held where payee induced issuance of draft by impersonating another person of the same name. *Jamieson & McFarland v. Herin*, 43 Wash. 153, 86 Pac. 165.

²¹⁵*Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; *Clark v. Pease*, 41 N. H. 414; *Farmers' Bank of Grand Rapids v. Butler*,

usury,²¹⁶ and want of failure of consideration,²¹⁷ are "equities" which cannot avail against a holder in due course. The fact that there were defects or omissions in the execution of a negotiable instrument, which are not apparent on its face, is not available against a holder in due course. Thus, a collateral agreement intended to be incorporated, but not incorporated, in the instrument, is not a defense;²¹⁸ nor can a mistake in date be shown against a holder in due course,²¹⁹ though such a mistake may be

48 Mich. 192; 12 N. W. 36, distinguishing *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675. But see *First Nat. Bank v. Bryan*, 62 Iowa, 42, 17 N. W. 165, where it was held that an innocent indorsee of a note secured by mortgage on a homestead could not enforce the mortgage as against the wife whose signature had been obtained by duress.

²¹⁶*Klar v. Kostink*, 65 Misc. 199, 119 N. Y. Supp. 683. Promissory notes void for usury as between the original parties are nevertheless valid and enforceable when discounted by a state bank for value before maturity in the due course of business, without notice of their usurious inception. *Schlesinger v. Gilhooley*, 189 N. Y. 1, 81 N. E. 619, affg. 116 App. Div. 914, 101 N. Y. Supp. 1143.

²¹⁷*Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923; *Middletown Bank v. Jerome*, 18 Conn. 443; *First Nat. Bank v. Ruhl*, 122 Ind. 279, 23 N. E. 766; *Arthurs v. Hart*, 58 U. S. (17 How.) 6, 15 Law. Ed. 338; *Rand v. Pantagraph Co.*, 1 Colo. App. 270, 28 Pac. 661; *Culver v. Hide & Leather Bank*, 78 Ill. 625; *Williams v. Cheney*, 69 Mass. (3 Grey) 215; *First Nat. Bank v. Skeen*, 101 Mo. 683, 14 S. W. 732; *Brookheim v. Alexander*, 64 Hun, 458, 19 N. Y. Supp. 776; *Hardie v. Wright*, 83 Tex. 345, 18 S. W. 615; *Rea v. McDonald*, 68 Minn. 187, 71 N. W. 11; *Kieth v. Fork*, 105 Ga. 511, 31 S. E. 169; *Merchants' & Planters' Bank v. Penland*, 101 Tenn. 445, 47 S. W. 673; *Davis v. Howell Cotton Co.*, 101 Ga. 128, 28 S. E. 612.

Liability of accommodation party to holder for value, see ante, § 66.

²¹⁸*Hodges v. Nash*, 141 Ill. 391, 31 N. E. 151; *Yellow Medicine County Bank v. Tagley*, 57 Minn. 391, 59 N. W. 486; *Donovan v. Fox*, 121 Mo. 236, 25 S. W. 915; *Lewis v. Long*, 102 N. C. 206, 9 S. E. 637, 11 Am. St. Rep. 725; *Davy v. Kelley*, 66 Wis. 452, 29 N. W. 232; *Miller v. Ottaway*, 81 Mich. 196, 45 N. W. 665, 21 Am. St. Rep. 513, 8 L. R. A. 428.

²¹⁹*Huston v. Young*, 33 Me. 85.

shown in his favor.²²⁰ Forgery and alteration as a defense against a holder in due course will be considered in a later chapter.²²¹

SAME.

§ 170. If an incomplete instrument is completed in disregard of the authority given and after the lapse of a reasonable time is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Exception.—Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

§ 171. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.

If an instrument be signed and delivered in blank, with intent that it shall be converted into a negotiable instrument, and, after the blanks are filled and the instrument completed, it is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it according to its terms, though it was not filled up within a reasonable time, or in accordance with the authority given.²²² The reason for the rule

²²⁰ *Germania Bank v. Distler*, 4 Hun (N. Y.) 633, *affd.* 64 N. Y. 642; *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197; *Jessup v. Dennison*, 2 Disn. (Ohio) 150.

²²¹ Chapter XV.

²²² *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Ore., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 14); Ariz. (§ 3317); Ill.

is sometimes placed on the theory that the person to whom the instrument is delivered becomes the agent of the person signing, and a purchaser is not bound by limitations on the authority of the agent, not brought home to him;²²³ and sometimes on the theory of estoppel.²²⁴ As the statute applies only to a holder in due course to whom the instrument has been negotiated, it is deemed applicable only to one who takes the instrument by negotiation from another who is a holder;²²⁵ and hence a payee

(§ 14); Kan. (§ 21); Md. (§ 33); Mich. (§ 16); Neb. (§ 14); N. Y. (§ 33); Ohio (§ 3171n); R. I. (§ 22); Wis. (§ 1675-14).

Thus, where the place for the sum payable was left blank, but "\$200" was written on the margin, a bona fide holder could fill the blank with any sum within that amount. *Norwich Bank v. Hyde*, 13 Conn. 279. Also, one who, with another, and for accommodation, signs a note having "\$45" expressed in one corner, but having a blank for the amount in the body of the instrument, and authorizes the other maker to write "forty-five dollars" in the blank space, is liable to a bona fide holder for \$450, in case the other maker fills out the blank with the words "four hundred and fifty," and adds a cipher to the "\$45." *Johnson Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; *Weidman v. Symes*, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603. See, also, *Snyder v. Van Doren*, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739, and cases cited. The maker of a note blank as to the date, time of maturity, amount and name of the payee who entrusts it to another with verbal instructions to buy personal property and fill in the name of the seller as payee and the amount of the purchase as the amount of the note, is liable to a bona fide holder where the person to whom the note was entrusted violated his instructions, and used the note to procure a personal loan. *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567. An acceptor who delivers a blank acceptance to another with authority to fill the blank is liable to a bona fide holder for the amount filled in, though it is greater than the amount authorized. *Van Duser v. Howe*, 21 N. Y. 531.

²²³*Snyder v. Van Doren*, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739; *Androscoggin Bank v. Kimball*, 64 Mass. (10 Cush.) 373; *Bank v. Neal*, 63 U. S. (22 How.) 107, 16 Law. Ed. 248; *Goodman v. Simonds*, 61 U. S. (20 How.) 361, 15 Law. Ed. 458. See, also, *Orrick v. Carlston*, 7 Grat. (Va.) 189.

²²⁴*Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573.

²²⁵*Herdman v. Wheeler*, 1 K. B. [1902] 361; *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 124 Am. St. Rep. 275. The decision of the court in this case is based upon a consideration of the definitions and applications of the terms "holder" and "holder in due course" as

to whom paper is delivered after an unauthorized completion is not within its protection.²²⁶ This changes what has been regarded as well settled law, namely, that one who intrusts an incomplete instrument to another to be completed by him is bound by an excessive or erroneous exercise of such authority as to any one who relies in good faith on the genuineness of such instrument.²²⁷ The wisdom of this change has been questioned upon the ground that it appears dangerous to cast any doubt upon a payee's right to recover when he has taken a bill or note complete and regular upon its face, honestly and for value.²²⁸ If there was no delivery with intent that the instrument be thereafter negotiated, and no authority, expressed or implied, to fill up the blanks, a bona fide holder cannot enforce the instrument against the signer.²²⁹ This rule of the law merchant is also the rule of the negotiable instruments laws.²³⁰

used in the negotiable instruments act, the conclusion of the court being that the latter term seems unquestionably to be used to indicate a person to whom after completion and delivery the instrument has been negotiated. A similar result has been reached by the English courts (*Herdman v. Wheeler*, 1 K. B. [1902] 361, where it was held that the word "issue" as defined in the act comprehends the excluded persons and that had the enacting body intended a different construction it would have made the section read "if such instrument after completion is issued or negotiated to a holder in due course."

²²⁶*Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 124 Am. St. Rep. 275. See, also, *Guerrant v. Guerrant*, 7 Va. Law Reg. 637. Compare *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

²²⁷This rule has been held applicable in favor of the payee as well as a transferee of the instrument. *Chariton Plow Co. v. Davidson*, 16 Neb. 374, 20 N. W. 256; *Johnson Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; *Fullerton v. Sturges*, 4 Ohio St. 530; *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 267.

²²⁸*Herdman v. Wheeler*, 1 K. B. [1902] 361.

²²⁹*Ledwich v. McKim*, 53 N. Y. 307. But See *Nance v. Lary*, 5 Ala. 370.

²³⁰*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 15); Ariz. (§ 3318); Ill. (§ 15); Kan. (§ 22); Md. (§ 34); Mich. (§ 17); Neb. (§ 15); N. Y. (§ 34); Ohio (§ 3171n); R. I. (§ 23); Wis. (§ 1675-15).

Contrary to the former law of some states,²³¹ the negotiable instruments act provides that where an instrument is in the hands of a holder in due course of business, a valid delivery by all prior parties is conclusively presumed. It will be observed that this presumption in favor of a bona fide holder is conclusive, and that want of delivery is no defense as against such a holder,²³² but, as has been previously shown, this presumption does not obtain, as against one signing before delivery, as to an instrument which, having been incomplete and undelivered, was wrongfully and without authority completed, delivered and negotiated.²³³

§ 172. A holder in due course may enforce payment of the instrument for the full amount thereof as against all parties liable thereon.

A holder in due course not only holds the instrument free from all prior equities and defenses, as shown in the preceding sections, but he may also enforce payment of the instrument for the full amount thereof against all parties liable thereon.²³⁴ This rule allowing a recovery of the face value is, in effect, an amplification

²³¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okla., Ore., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 16); Ariz. (§ 3319); Ill. (§ 16); Kan. (§ 23); Md. (§ 35); Mich. (§ 18); Neb. (§ 16); N. Y. (§ 35); Ohio (§ 3171 o); R. I. (§ 24); Wis. (§ 1675-16).

²³²Clarke v. Johnson, 54 Ill. 296; McCormick v. Holmes, 41 Kan. 265, 21 Pac. 108; Kinyon v. Wohlford, 17 Minn. 239. Contra, see Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923. The conclusive presumption of delivery in favor of a bona fide holder exists as well when the note is taken from a thief as in any other case. Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

²³³See supra, this section. Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

²³⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 57); Ariz. (§ 3360); Ill. (§ 57); Kan. (§ 64); Md. (§ 76); Mich. (§ 59); Neb. (§ 57); N. Y. (§ 96); Ohio (§ 3173B); R. I. (§ 65); Wis. (§ 1676-27).

Not limited to amount paid for note with interest. Jefferson Bank of St. Louis v. Chapman-White-Lyons Co. (Tenn.) 123 S. W. 641.

of the rule that mere inadequacy of consideration does not show *mala fides*.²³⁵ As between remote parties to a bill of exchange, as the payee or indorsee and the acceptor, in order to sustain the defense of no consideration, two considerations must at least come in question: First, that which the defendant received for his liability; and, secondly, that which the plaintiff gave for his title.²³⁶ An action between remote parties will not fail unless there be an absence or failure of both of these considerations.²³⁷ The rules do not, however, cure void, usurious,²³⁸ or gaming,²³⁹ transactions, or affect the doctrine that one who makes a loan on commercial paper, or takes it as security for a precedent debt,

The Wisconsin negotiable instruments law adds (§ 1676-27): "Except as provided in sections 1944 and 1945 of these statutes (Rev. St. 1878), relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provisions of section 1676-25 of this act." Section 1945 provides that notes or obligations given for premiums on fire insurance shall become void if the company becomes insolvent or bankrupt during the life of the policy, as far as the premium was unearned at the time of insolvency or bankruptcy. Section 1944 is considered in section 32, ante. *Lassas v. McCarthy*, 47 Or. 474, 84 Pac. 76.

²³⁵*Scott v. Seelye*, 27 La. Ann. 95; *Forepaugh v. Baker* (Pa.) 13 Atl. 465; *Daniels v. Wilson*, 21 Minn. 530.

²³⁶*National Park Bank v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927.

²³⁷*National Park Bank v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927. Failure of consideration no defense against bona fide holder. *Bank of Guntersville v. Jones Cotton Co.* (Ala.) 46 So. 971. The breach of an executory agreement which forms the consideration for a note is no defense in whole or in part against an indorsee who took the note before maturity, even if he had notice of the contract, unless he was informed of the breach before its purchase. *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88.

²³⁸*Hart v. Adler*, 109 Ala. 467, 19 So. 894; *Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, 24 L.R.A. 280. But see *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487, 50 Am. St. Rep. 860, 29 L. R. A. 827.

²³⁹*Conklin v. Roberts*, 36 Conn. 461; *Harper v. Young*, 112 Pa. 419, 3 Atl. 670; *Traders' Bank v. Alsop*, 64 Iowa, 97, 19 N. W. 863; *Swinney v. Edwards*, 8 Wyo. 54, 55 Pac. 306, 80 Am. St. Rep. 916.

can recover only the amount loaned or secured.²⁴⁰ It is doubtful, too, whether it will cure transactions in which the consideration is so grossly inadequate as to indicate fraud.²⁴¹ The rule affirms the doctrine of the federal courts,²⁴² and that of most of the state courts,²⁴³ but changes the rule in others.²⁴⁴

HOLDER NOT IN DUE COURSE.

§ 173. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.

§ 174. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Where a negotiable instrument comes into the hands of a holder who is not a holder in due course, it is subject, as against him, to the same defenses as if it were non-negotiable,²⁴⁵ and this rule applies also to accommodation paper.²⁴⁶

²⁴⁰ *Cromwell v. County of Sac*, 96 U. S. 51, 60, 24 Law. Ed. 681; *Kelly v. Ferguson*, 46 How. Pr. (N. Y.) 411.

²⁴¹ *Gould v. Stevens*, 43 Vt. 125, 5 Am. Rep. 265; *Hunt v. Sanford*, 14 Tenn. (6 Yerg.) 387; *De Witt v. Perkins*, 22 Wis. 451, 99 Am. Dec. 68; *Smith v. Jansen*, 12 Neb. 125, 10 N. W. 537, 41 Am. Rep. 761.

²⁴² *Cromwell v. County of Sac*, 96 U. S. 51, 60, 24 Law. Ed. 681.

²⁴³ *Sully v. Goldsmith*, 32 Iowa, 397; *United States Nat Bank v. McNair*, 116 N. C. 550, 21 S. E. 389; *Kitchen v. Loudonback*, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540; *Hobart v. Penny*, 70 Me. 248.

²⁴⁴ See *Huff v. Wagner*, 63 Barb (N. Y.) 215, 230; *Todd v. Shelbourne*, 8 Hun (N. Y.) 512; *Campbell v. Brown*, 100 Tenn. 245, 48 S. W. 970.

²⁴⁵ Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 58); Ariz. (§ 3361); Ill. (§ 58); Kan. (§ 65); Md. (§ 77); Mich. (§ 60); Neb. (§ 58); N. Y. (§ 97); Ohio, (§ 3173C); R. I. (§ 66); Wis. (§ 1676-28).

Weiss v. Rieser, 62 Misc. 292, 114 N. Y. Supp. 983.

²⁴⁶ *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931.

Holder deriving title from holder in due course.

An exception to the rule laid down in the last section is found in the further rule that a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the latter.²⁴⁷ But a payee who transfers a note to a bona fide holder, and afterwards repurchases it for a new consideration, is not a bona fide holder. In a case deciding this point the court said: "It cannot be very important to him [the innocent transferee from the payee] that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community, the market value of his security is not likely to be affected by the circumstances that a single individual cannot compete for its purchase, especially when we consider that the nature of negotiable securities is such that their market value is very little influenced by competition."²⁴⁸

²⁴⁷Same sections of negotiable instruments laws as last above cited.

Miller v. Talcott, 54 N. Y. 114; Cheever v. Pittsburg, S. & L. E. R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69; Glenn v. Farmers' Bank, 70 N. C. 191; O'Connor v. Clarke (Cal.) 44 Pac. 482; Wood v. Starling, 48 Mich. 592, 12 N. W. 866; Matson v. Alley, 141 Ill. 284; Koehler v. Dodge, 31 Neb. 328, 47 N. W. 913, 28 Am. St. Rep. 518; Jones v. Wiesen, 50 Neb. 243, 69 N. W. 762; Knight v. Tinney, 59 Neb. 274, 80 N. W. 912; McFarland v. State Bank of Chase, 7 Kan. App. 122, 52 Pac. 110; Bank of Sonoma County v. Gove, 63 Cal. 355, 49 Am. Rep. 92.

²⁴⁸Kost v. Bender, 25 Mich. 515.

CHAPTER XII.

PRESENTMENT FOR PAYMENT.

- § 175. When Necessary.
- § 176. Instrument Payable at a Special Place.
- § 177. Necessary to Charge Drawers and Indorsers.
- § 178. By Whom Made.
- § 179. To Whom Made.
- § 180. Party Primarily Liable Dead.
- § 181. Several Persons Primarily Liable.
- § 182. Time for Presentment.
- § 183. Instruments Payable at Bank.
- § 184. Day of Maturity Sunday or Holiday.
- § 185. Day of Maturity Saturday.
- § 186. Days of Grace.
- § 187. Determining Date of Maturity.
- § 188. Instruments Payable and Not Payable on Demand.
- § 189. Checks.
- § 190. Excusable Delay.
- § 191. Presentment to Acceptor For Honor.
- § 192. Place For Presentment.
- § 193. Manner of Presentment.
- § 194. Dispensing With and Waiver of Presentment.
- § 195. Waiver of Protest Includes.
- § 196. Dishonor For Nonpayment.
- § 197. Rights of Parties on Dishonor.
- § 198. Referees in Case of Need.

The law simply requires substantial compliance in reference to proper presentment for payment, and, where there has been such a compliance, will not strain to find grounds for releasing an indorser on omission to observe more technical rules not prejudicing the indorser.¹

¹Gilpin v. Savage, 60 Misc. 605, 112 N. Y. Supp. 802.

WHEN NECESSARY.

- § 175. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument.
- § 176. If the instrument is, by its terms, payable at a special place, and the party primarily liable is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part.
- § 177. As a general rule, presentment for payment is necessary in order to charge the drawer and indorsers.

Exceptions.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.

Presentment for payment is not necessary to charge the person primarily liable on the instrument,² that is, the person who by the

² Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 70); Ariz. (§ 3373); Ill. (§ 70); Kan. (§ 77); Md. (§ 89); Mich. (§ 72); Neb. (§ 70); N. Y. (§ 130); Ohio (§ 3173 o); R. I. (§ 78); Wis. (§ 1678).

Florence O. & R. Co. v. First Nat. Bank, 38 Colo. 119, 88 Pac. 182; McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781; Mosser v. Criswell, 150 Pa. 409, 24 Atl. 618; Wilkins v. McGuire, 2 App. D. C. 448; Wamsley v. Darragh, 14 Misc. 566, 35 N. Y. Supp. 1075; Cox v. National Bank, 100 U. S. 704, 713, 25 Law. Ed. 739. In determining who are primarily liable on an instrument, it must be remembered that no person is liable unless his name appears on the instrument. Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 18); Ariz. (§ 3321); Ill. (§ 18); Kan. (§ 25); Md. (§ 37); Mich. (§ 20); Neb. (§ 18); N. Y. (§ 37);

terms of the instrument is absolutely required to pay the same;³ but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender on his part.⁴ Both under the statute, and by the weight of previous authority in this country, contrary to the law of England, where a note or bill of exchange is payable at a particular time and place, no demand or presentment at the place named is necessary in order to entitle the holder to maintain an action upon the note or bill against the maker or acceptor.⁵ The same rule applies to a note

Ohio (§ 3171q); R. I. (§ 26); Wis. (§ 1676-18). That the drawee is not liable until he accepts. Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§127); Ariz. (§ 3430); Ill. (§ 126); Kan. (§ 134); Md. (§ 146); Mich. (§ 129); Neb. (§ 126); N. Y. (§ 211); Ohio (§ 3175-R); R. I. (§ 135); Wis. (§ 1680-a). And that a bank is not liable on a check until it accepts or certifies it. Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 189); Ariz. (§ 3487); Ill. (§ 188); Kan. (§ 196); Md. (§ 208); Mich. (§ 191); Neb. (§ 188); N. Y. (§ 325); Ohio (§ 3177z); R. I. (§ 197); Wis. (§ 1684-5).

The acceptor is primarily liable and hence is not entitled to presentment for payment. *Hunt v. Johnson*, 96 Ala. 130, 11 So. 387; *James v. Ocoee Bank*, 42 Tenn. (2 Cold.) 57; *Steiner v. Jeffries*, 118 Ala. 573, 24 So. 37. See post, chapter XVI, Payment and Discharge.

³Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 192); Ariz. (§ 3488); Ill. (§ 191); (§ 19); Kan. (§ 3); Md. (§ 15); Mich. (§ 2); Neb. (§ 190); N. Y. (§ 3); Ohio (§ 3178a); R. I. (§ 3); Wis. (§ 1675).

⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 70); Ariz. (§ 3373); Ill. (§ 70); Kan. (§ 77); Md. (§ 89); Mich. (§ 72); Neb. (§ 70); N. Y. (§ 130); Ohio (§ 3173o); R. I. (§ 78); Wis. (§ 1678).

This provision is not in the negotiable instruments law of Wisconsin. The negotiable instruments law of New York has been amended by inserting after the word "maturity" the clause, "and has funds there available for that purpose." Laws 1898, c. 336, § 11.

Florence O. & R. Co. v. First Nat. Bank, 38 Colo. 119, 88 Pac. 182.

⁵*Farmers' Nat. Bank v. Venner*, 192 Mass. 531, 78 N. E. 540.

payable on demand at a particular place.⁶ But not being willing and able to pay it there at maturity, interest after maturity is recoverable though no demand was made.⁷

Presentment necessary to charge drawer and indorsers—Exceptions.

Presentment is necessary, however, to charge the drawer and indorsers,⁸ except that it is not required, in order to charge a drawer, if he has no right to expect or require that the drawee or acceptor will pay the instrument;⁹ nor is it necessary to charge

⁶*Farmers' Nat. Bank v. Venner*, 192 Mass. 531, 78 N. E. 540. The court says: "No demand is necessary before suit, where a note is payable generally on demand, and as we have seen no demand is necessary when a note is payable on time at a particular place. It seems to us that the fact that both circumstances are found in the same note cannot operate to change the rule and render a demand necessary when it would not otherwise be required."

In an action on a note payable at a specified place, a demand need not be averred or proved, and, if the maker was ready and offered at the time and place to pay it, this is a matter of defense to be pleaded and proved by him. *Florence O. & R. Co. v. First Nat. Bank*, 38 Colo. 119, 88 Pac. 265.

⁷*Parsons v. Utica Cement Mfg. Co.*, 80 Conn. 58, 66 Atl. 1024.

⁸*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 70); *Ariz.* (§ 3373); *Ill.* (§ 70); *Kan.* (§ 77); *Md.* (§ 89); *Mich.* (§ 72); *Neb.* (§ 70); *N. Y.* (§ 130); *Ohio* (§ 3173o); *R. I.* (§ 78); *Wis.* (§ 1678).

Presbrey v. Thomas, 1 App. D. C. 171; *Howard Bank v. Carson*, 50 Md. 18; *Seacord v. Miller*, 13 N. Y. 55. Presentment is necessary to charge the drawer of a bill. *Hoyt v. Seeley*, 18 Conn. 353; *Jaudon v. Read*, 32 How Pr. (N. Y.) 190; *Grange v. Reigh*, 93 Wis. 552, 67 N. W. 1130. It is also necessary to charge the drawer of a check. *Daniels v. Kyle*, 5 Ga. 245; *Green v. Darling*, 15 Me. 139; *Gough v. Staats*, 13 Wend. (N. Y.) 549; *Kelly v. Brown*, 71 Mass. (5 Gray) 108; *Scott v. Meeker*, 20 Hun (N. Y.) 161. Presentment of a non-negotiable instrument is not necessary. *White v. Low*, 7 Barb. (N. Y.) 204; *Smith v. Cromer*, 66 Miss. 157, 5 So. 619.

⁹*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 79); *Ariz.* (§ 3382); *Ill.* (§ 79); *Kan.* (§ 86); *Md.* (§ 98); *Mich.* (§ 81); *Neb.* (§ 79); *N. Y.*

an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.¹⁰

BY WHOM MADE.

§ 178. Presentment for payment to be sufficient must be made by the holder, or by some person authorized to receive payment on his behalf.

Presentment for payment must be made by the holder or by some person authorized to receive payment on his behalf.¹¹ It is not necessary that presentment be made by a notary;¹² but any person who has possession of the instrument at the time and place

(§ 139); Ohio (§ 3173x); R. I. (§ 87); Wis. (§ 1678-9):

Dickins v. Beal, 35 U. S. (10 Pet.) 572, 9 Law. Ed. 246; Rhett v. Poe, 43 U. S. (2 How.) 457, 11 Law. Ed. 167. Lack of funds in hands of drawee, see Howes v. Austin, 35 Ill. 396; Beauregard v. Knowlton, 156 Mass. 395, 31 N. E. 389; Franklin v. Vanderpool, 1 N. Y. Super. Ct. 78. Where the drawer obtains an acceptance and indorsement for his accommodation and receives the proceeds of the bill, he is not entitled to presentment for payment. Barbaroux v. Waters, 3 Metc. (Ky.) 304.

¹⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 80); Ariz. (§ 3383); Ill. (§ 80); Kan. (§ 87); Md. (§ 99); Mich. (§ 82); Neb. (§ 80); N. Y. (§ 140); Ohio (§ 3173y); R. I. (§ 88); Wis. (§ 1678-10).

Luckenbach v. McDonald, 164 Fed. 296; Reid v. Morrison, 2 Watts & S. (Pa.) 401.

¹¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 72); Ariz. (§ 3375); Ill. (§ 72); Kan. (§ 79); Md. (§ 91); Mich. (§ 74); Neb. (§ 72); N. Y. (§ 132); Ohio (§ 3173q); R. I. (§ 80); Wis. (§ 1678-2).

¹²Cole v. Jessup, 10 N. Y. 96; Shed v. Brett, 18 Mass. (1 Pick.) 401; Sussex Bank v. Baldwin, 17 N. J. Law, 487, where the court said: "There is an impression current, in some degree, that a presentment of a note must be made by a notary, or at least on his behalf, and that he must protest it upon nonpayment before the indorser is liable. But this is not so. Any person may present at its maturity a promissory note of which he is put in possession."

of payment is deemed *prima facie* to have authority and may present the instrument for payment.¹³

TO WHOM MADE.

§ 179. Presentment for payment must be made to the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

§ 180. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

§ 181. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Presentment for payment must be made to the person primarily liable, or, if he is absent or inaccessible, to any person found at the place of presentment.¹⁴ Where the person primarily liable

¹³*Cole v. Jessup*, 10 N. Y. 96; *Baer v. Leppert*, 12 Hun (N. Y.) 516; *Sussex Bank v. Baldwin*, 17 N. J. Law, 487. But see *Doubleday v. Kress*, 50 N. Y. 410. One holding an instrument for collection is deemed a holder within the rule. *Freeman's Bank v. Perkins*, 18 Me. 292; *Blakeslee v. Hewitt*, 76 Wis. 341, 44 N. W. 1105.

¹⁴*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 72); Ariz. (§ 3375); Ill. (§ 72); Kan. (§ 79); Md. (§ 91); Mich. (§ 74); Neb. (§ 72); N. Y. (§ 132); Ohio (§ 3173q); R. I. (§ 80); Wis. (§ 1678-2).

The temporary absence of an indorser from his place of business does not excuse nonpresentment. *Wilson v. Senier*, 14 Wis. 411. See,

is dead, and no place of payment is specified, presentment for payment may be made to his personal representative, if there be one, and he can be found after the exercise of reasonable diligence,¹⁵ and presentment at a national bank in the hands of a receiver is sufficient.¹⁶ If the persons primarily liable were partners, and no place of payment was specified, presentment for payment may be made to any one of them,¹⁷ even after a dissolution of the firm.¹⁸ Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.¹⁹ This is the

also, *Granite Bank v. Ayers*, 33 Mass. (16 Pick.) 392. Who is person primarily liable, see note 2, *supra*.

¹⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 76); Ariz. (§ 3379); Ill. (§ 76); Kan. (§ 83); Md. (§ 95); Mich. (§ 78); Neb. (§ 76); N. Y. (§ 136); Ohio (§ 3173v); R. I. (§ 84); Wis. (§ 1678-6).

Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007; *Huff v. Ashcraft*, 1 Disn. (Ohio) 277.

Presentment on death of one of two partners who are makers, see note 18, *infra*.

¹⁶*Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383.

¹⁷*Mount Pleasant Branch of State Bank v. McLeran*, 26 Iowa, 306; *Hunter v. Hempstead*, 1 Mo. 67.

Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 77); Ariz. (§ 3380); Ill. (§ 77); Kan. (§ 84); Md. (§ 96); Mich. (§ 79); Neb. (§ 77); N. Y. (§ 137); Ohio (§ 3173v); R. I. (§ 85); Wis. (§ 1678-7).

¹⁸Same sections of negotiable instruments laws as last above cited.

Barry v. Crowley, 4 Gill. (Md.) 194; *First Nat. Bank v. Heuschen*, 52 Mo. 207.

After dissolution by bankruptcy, see *Gates v. Beecher*, 60 N. Y. 518.

After dissolution by death of one partner, see *Cayuga County Bank v. Hunt*, 2 Hill (N. Y.) 635; *Barlow v. Coggan*, 1 Wash. T. 257.

¹⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 78); Ariz. (§ 3381); Ill. (§ 78); Kan. (§ 85); Md. (§ 97); Mich. (§ 80); Neb. (§ 78); N. Y. (§ 138); Ohio (§ 3173v); R. I. (§ 86); Wis. (§ 1678-8).

rule in force in most of the states,²⁰ and has been applied where one or more of the makers were sureties.²¹ Compliance with this latter rule proving impracticable, such presentment may be dispensed with under the rule allowing one so to do, where, after the exercise of reasonable diligence, presentment as required by the act cannot be made.²²

TIME.

§ 182. Presentment for payment, to be sufficient, must be made at a reasonable hour on a business day.

§ 183. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

§ 184. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day.

§ 185. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

Presentment for payment must be made at a reasonable hour

²⁰Bank of Red Oak v. Orvis, 40 Iowa, 332; Arnold v. Dresser, 90 Mass. (8 Allen) 435; Benedict v. Schmieg, 13 Wash. 476.

²¹Britt v. Lawson, 15 Hun (N. Y.) 123.

²²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 82); Ariz. (§ 3385); Ill. (§ 82); Kan. (§ 89); Md. (§ 101); Mich. (§ 84); Neb. (§ 82); N. Y. (§ 142); Ohio (§ 3174); R. I. (§ 90); Wis. (§ 1678-12).

See post, § 194.

on a business day.²³ What is a reasonable hour within this rule depends on circumstances,²⁴ and is to be determined by reference to the general custom at the place of the particular transaction in question.²⁵ In case of a transaction occurring in a foreign jurisdiction, the court cannot take judicial notice of what constitutes a reasonable hour on a business day.²⁶ It is a matter of proof, though a notarial certificate of the transaction, being regular so as to furnish prima facie proof that the paper was duly presented for payment, raises a presumption that the presentment was made at a proper time.²⁷

Instruments payable at bank.

Where the instrument is payable at a bank, presentment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.²⁸ What constitutes banking hours is to

²³Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 72); Ariz. (§ 3375); Ill. (§ 72); Kan. (§ 79); Md. (§ 91); Mich. (§ 74); Neb. (§ 72); N. Y. (§ 132); Ohio (§ 3173q); R. I. (§ 80); Wis. (§ 1678-2).

²⁴Cayuga County Bank v. Hunt, 2 Hill (N. Y.) 635.

²⁵A presentment at a bank after business hours on the day of maturity, but before the officers had left the bank, was sufficient. *Allan v. Avery*, 47 Me. 287. A presentment at 9 o'clock P. M., on the last day of grace, at the residence of the maker after he had retired, was sufficient. *Farnsworth v. Allen*, 70 Mass. (4 Gray) 453.

²⁶Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451.

²⁷Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451. On the question whether a presentment, at 5:20 o'clock P. M., of a note payable at an office in an insurance building in Chicago, was made within business hours, evidence as to what were the ordinary business hours in that city was admissible. *Clough v. Holden*, 115 Mo. 336, 21 S. W. 1071.

²⁸Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451.

²⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 75); Ariz. (§ 3378); Ill.

be determined by reference to the general custom at the place of the particular transaction in question,²⁹ and the court cannot take judicial notice of what constitutes the custom in foreign jurisdictions,³⁰ but such custom is a matter of proof.³¹ Presentment a few minutes after the regular time for closing is sufficient if such is the custom of the bank;³² but a presentment to an officer of the bank out of business hours would not ordinarily be sufficient.³³

(§ 75); Kan. (§ 82); Md. (§ 94); Mich. (§ 77); Neb. (§ 75); N. Y. (§ 135); Ohio (§ 3173t); R. I. (§ 83); Wis. (§ 1678-5).

Matlock v. Scheuerman (Or.) 93 Pac. 823. See Allen v. Avery, 47 Me. 287.

Since the maker of a note payable at a bank has up to the close of business hours to deposit money to meet it, presentment should be made at the time of closing. Church v. Clark, 38 Mass. (21 Pick.) 310; Harrison v. Crowder, 14 Miss. (6 Smedes & M.) 464. Where the office hours of a bank ended at 4 o'clock P. M., and the indorser of a note payable there was ready to pay the same on the day of its maturity, and on that day sent the maker to the bank several times to see if the note was there and ascertain its amount, and the maker was informed that the note was not there, but the note was finally presented at the bank on that day by the holder, who obtained admittance at about 5 o'clock P. M., and demanded payment, which was refused because no funds had been furnished to meet the note, the indorser was held liable, the court stating that the circumstances did not take the case out of the general rule, and that "had the maker gone to the bank prepared to pay the note, and waited there for that purpose until the close of business hours, and then left, or had he placed funds in the bank and allowed them to remain there until the close of business hours, and then withdrawn them in consequence of the nonpresentment of the note, we are of the opinion that a subsequent presentation would not have been sufficient to charge the indorser." Salt Springs Nat. Bank v. Burton, 58 N. Y. 430, citing Bank of Syracuse v. Hollister, 17 N. Y. 46; Shepherd v. Chamberlain, 74 Mass. (8 Gray) 225; Flint v. Rogers, 15 Me. 67; Allen v. Avery, 47 Me. 287.

²⁹Columbian Banking Co. v. Bowen, 218 Wis. 4, 51, 114 N. W. 451.

³⁰Columbian Banking Co. v. Bowen, 218 Wis. 4, 51, 114 N. W. 451.

³¹Columbian Banking Co. v. Bowen, 218 Wis. 4, 51, 114 N. W. 451.

³²Bank of Utica v. Smith, 18 Johns. (N. Y.) 230. See, also, Salt Springs Nat. Bank v. Burton, 58 N. Y. 430.

³³Swan v. Hodges, 40 Tenn. (3 Head) 251.

Day of maturity is Sunday or a holiday.

When the day of maturity falls on Sunday or a holiday, the instrument is payable on the next succeeding business day.³⁴ This rule is an application of the general rule that where the day, or the last day, for doing any act required or permitted by the negotiable instruments laws, falls on Sunday or a holiday, the act may be done on the next succeeding secular or business day.³⁵

Day of maturity is Saturday.

Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.³⁶ This provision is not in

³⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 85); Ariz. (§ 3388); Ill. (§ 85); Kan. (§ 92); Md. (§ 104); Mich. (§ 87); Neb. (§ 85); N. Y. (§ 145); Ohio (§ 3174c); R. I. (§ 93); Wis. (§ 1678-15).

³⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. V., Wyo. (§ 194); Ariz. (§ 3490); Ill. (§ 193); Kan. (§ 5); Md. (§ 17); Mich. (§ 2); Neb. (§ 192); N. Y. (§ 5); Ohio (§ 3178c); R. I. (§ 5); Wis. (§ 1675).

³⁶Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 85); Ariz. (§ 3388); Ill. (§ 85); Kan. (§ 92); Md. (§ 104); Mich. (§ 87); Neb. (§ 85); N. Y. (§ 145); Ohio (§ 3174c); R. I. (§ 93); Wis. (§ 1678-15).

This provision of the negotiable instruments law has been amended in New York by inserting after the words "instruments falling due" the words "or becoming payable." Laws 1898, c. 336, § 13.

Saturday afternoon was made a half holiday in New York by Laws 1887, c. 289, § 1. See *Sylvester v. Crohan*, 138 N. Y. 494, 34 N. E. 273, where it was held that "a party whose duty it is to collect or present for payment a bill, note or draft which falls due on Saturday, is not chargeable with neglect or omission of duty because of failure to present it on that day, providing he does present it on Monday, or the next secular day, and then, on that day, gives notice of dishonor in case of nonpayment."

the negotiable instruments law of Wisconsin,³⁷ and in that state instruments falling due on Saturday are payable on that day. In the negotiable instruments law of Colorado is a provision that "instruments falling due on any day, in any place where any part of such day is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during reasonable hours of the part of such day which is not a holiday."³⁸

§ 186. Every negotiable instrument is payable at the time fixed therein without grace.

Most of the negotiable instruments laws contain the provision that "every negotiable instrument is payable at the time fixed therein without grace."³⁹ But three days of grace are allowed on sight drafts by the negotiable instruments law of Rhode Island;⁴⁰ and on notes, acceptances, and sight drafts by the law as adopted in North Carolina;⁴¹ while the negotiable instruments act as first adopted in Massachusetts has already been amended so as to allow three days of grace on sight drafts.⁴² Under the English Bills of Exchange Acts 1882, providing that a bill is due and payable "on the last day of grace," the holder cannot begin, on the last day of grace, an action against the acceptor, who had refused payment on that day, as no cause of action arises until after the expiration of that day.⁴³

³⁷See Negotiable Inst. Law, § 1678-15.

³⁸Negotiable Inst. Law, § 85.

³⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 85); Ariz. (§ 3388); Ill. (§ 85); Kan. (§ 92); Md. (§ 104); Mich. (§ 87); Neb. (§ 85); N. Y. (§ 145); Ohio (§ 3174c); R. I. (§ 93); Wis. (§ 1678-15).

⁴⁰Negotiable Inst. Law, § 93.

⁴¹Negotiable Inst. Law, § 85.

⁴²Act March 6, 1899.

⁴³45 & 46 Vict. c. 61, § 14, subd. 1. Kennedy v. Thomas [1894] 2 Q. B. 759.

- § 187. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

The instrument being payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and including the day of payment.⁴⁴

- § 188. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

- § 189. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

Instruments not payable on demand.

Instruments not payable on demand must be presented for payment on the day they fall due.⁴⁵ Under this provision of the ne-

⁴⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 86); Ariz. (§ 3389); Ill. (§ 86); Kan. (§ 93); Md. (§ 105); Mich. (§ 88); Neb. (§ 86); N. Y. (§ 146); Ohio (§ 3174d); R. I. (§ 94); Wis. (§ 1678-16).

See New York Statutory Construction Law, §§ 26, 27.

⁴⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 71); Ariz. (§ 3374); Ill. (§ 71); Kan. (§ 78); Md. (§ 90); Mich. (§ 73); Neb. (§ 71); N. Y. (§ 131); Ohio (§ 3173p); R. I. (§ 79); Wis. (§ 1678-1).

Days of grace abolished, see ante, § 136. For time of maturity in general, see ante, § 135.

gotiable instruments laws it has been held that if notes in a series are payable at different times, and default in payment of the first is to mature the others immediately, the holders of others than the first have a reasonable time within which to present them after the dishonor of the first note.⁴⁶

Instruments payable on demand.

The negotiable instruments laws have changed the rule, in several states,⁴⁷ as to the time for presentment of an instrument payable on demand, by providing that presentment of such instrument for payment must be made within a reasonable time after their issuance, except that, in case of a bill of exchange, presentment for payment within a reasonable time after the last negotiation is sufficient.⁴⁸ A note payable "on demand after date"

⁴⁶*Creteau v. Foote*, 40 App. Div. 215, 57 N. Y. Supp. 1103.

⁴⁷Massachusetts, where demand notes have hitherto been overdue at the end of 60 days from date (St. 1839, c. 121, § 2. See *Rice v. Wesson*, 52 Mass. [11 Metc.] 400); Connecticut, where they could be presented within four months (Gen. St. p. 405; *Rhodes v. Seymour*, 36 Conn. 1); and New York, where they were treated as good security for indefinite time (*Merritt v. Todd*, 23 N. Y. 28; *Parker v. Stoud*, 98 N. Y. 379, rvg. 31 Hun. [N. Y.] 578). In Vermont demand notes must be presented within 60 days. Rev. Laws, § 2013. *Verder's Ex'r v. Verder*, 63 Vt. 38, 21 Atl. 611.

⁴⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 71); Ariz. (§ 3374); Ill. (§ 71); Kan. (§ 78); Md. (§ 90); Mich. (§ 73); Neb. (§ 71); N. Y. (§ 131); Ohio (§ 3173p); R. I. (§ 79); Wis. (§ 1678-1).

To hold indorser, presentment for payment must be made within a reasonable time. *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329. As regards indorsers, presentment for payment is sufficient if made within a reasonable time after the last negotiation. *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451; *Plover Sav. Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29. A failure to demand payment of a demand note for two and one-half years, or to notify the indorsers, releases them. *Home Sav. Bank v. Hosie*, 119 Mich. 116, 77 N. W. 625. Effect of negotiation as extending time, see *Rice v. Wesson*, 52 Mass. (11 Metc.) 400; *Union Bank v. Ezell*, 29 Tenn. (10 Humph.) 385; *Corwith v. Morrison*, 1 Pin. (Wis.) 489.

is a demand note and not one payable on a fixed day, hence need only be presented for payment within a reasonable time.⁴⁹ In considering what is a "reasonable time," regard is to be had to the usage of the trade, the nature of the instrument, and the facts of the particular case.⁵⁰ The facts being disputed and the evidence conflicting, the question is a mixed one of law and fact to be decided by the jury under instructions from the court, but where the facts are not in dispute the question is one of law.⁵¹ The burden being on the holder to prove due and timely presentment, the fact that it was not so presented need not be specially pleaded by the indorser.⁵²

The statutory requirement that a note payable on demand must be presented for payment within a reasonable time is in the nature of a statute of limitations,⁵³ and hence the burden is on one claiming it was not so presented to plead and prove such fact, and if he fails to do so he will be deemed to have waived the defense.⁵⁴

Checks.

A check, being a bill payable on demand,⁵⁵ is governed by the above rule, and must be presented for payment within a reasonable time after its issuance, or the drawer will be discharged from liability thereon to the extent of the loss caused by the

⁴⁹Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. Supp. 383.

⁵⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 193); Ariz. (§ 3489); Ill. (§ 192); Kan. (§ 4); Md. (§ 16); Mich. (§ 2); Neb. (§ 191); N. Y. (§ 4); Ohio (§ 3178B); R. I. (§ 4); Wis. (§ 1675).

German American Bank v. Mills, 99 App. Div. 312, 91 N. Y. Supp. 142; Anderson v. First Nat. Bank (Iowa) 122 N. W. 918.

⁵¹Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020; German American Bank v. Mills, 99 App. Div. 312, 91 N. Y. Supp. 142; Anderson v. First Nat. Bank (Iowa) 122 N. W. 918.

⁵²Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020.

⁵³German American Bank v. Mills, 99 App. Div. 312, 91 N. Y. Supp. 142.

⁵⁴German American Bank v. Mills, 99 App. Div. 312, 91 N. Y. Supp. 142.

⁵⁵See ante, § 9. Code Supp. 1902, § 3060-a 185. Plover Sav. Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29.

delay.⁵⁶ It has long been a general rule that presentment of a check must be made within a reasonable time after its issuance.⁵⁷ The negotiable instruments act provides generally that in determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instrument, and the facts of the particular case.⁵⁸ This, however, would not seem

⁵⁶Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 186); Ariz. (§ 3487); Ill. (§ 185); Kan. (§ 193); Md. (§ 205); Mich. (§ 188); Neb. (§ 185); N. Y. (§ 322); Ohio (§ 3177w); R. I. (§ 194); Wis. (§ 1684-2).

Drawer of check must show special injury by delay in presentment. *Emery v. Hobson*, 62 Me. 578; *Cowing v. Altman*, 79 N. Y. 167; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425. Also in case of failure to present for payment. *Allen v. Kramer*, 2 Ill. App. 205. But see *Ford v. McClung*, 5 W. Va. 156; *First Nat. Bank v. Miller*, 37 Neb. 500, 65 N. W. 1064, holding that the indorser need not show special injury. A payee who neglects to present a check within a reasonable time must stand any loss occasioned by his default. *Greely v. Cascade County*, 21 Mont. 580, 57 Pac. 274.

Delay operates as a discharge only to extent of loss. *Cox v. Citizens' State Bank*, 73 Kan. 789, 85 Pac. 762; *Dehoust v. Lewis*, 128 App. Div. 131, 112 N. Y. Supp. 559; *Kramer v. Grant*, 60 Misc. 109, 111 N. Y. Supp. 709; *Gordon v. Levine*, 194 Mass. 418, 80 N. E. 505; *State Bank of Gothenburg v. Carroll*, 81 Neb. 484, 116 N. W. 276. In the absence of a showing of loss, the mere fact of forwarding check direct to drawee instead of to collecting agent does not discharge indorser. *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 605, 113 N. W. 481. As against an indorser, the fact that the holder sends the check or bill direct to the drawee bank for payment instead of selecting an independent agent to make demand for payment is immaterial, the indorser having suffered no injury thereby. So held where check was not paid by drawee bank solely because the maker had stopped payment before demand was made. *Plover Sav. Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29.

⁵⁷*Bull v. First Nat. Bank*, 14 Fed. 612; *Woodruff v. Plant*, 41 Conn. 344; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304.

⁵⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 193); Ariz. (§ 3489); Ill. (§ 192); Kan. (§ 4); Md. (§ 16); Mich. (§ 2); Neb. (§ 191); N. Y. (§ 4); Ohio (§ 3178b); R. I. (§ 4); Wis. (§ 1675).

Holder of check is required to present it for payment within a reason-

to lay down or establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. One of the rules which has been established is, that where the drawer and drawee and the payee are all in the same city or town, a check, to be presented within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer.⁵⁹ If they are not in the same place it is only necessary that the check be put in course of circulation within the time otherwise allowed by law.⁶⁰ Most of the cases, however, have been decided on their own peculiar facts,⁶¹ and in this connection the usage of banks relating to the presentation of checks

able time after its issue, according to the usages of business and the circumstances of the case. *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 605, 113 N. W. 481; *Plover Savings Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29.

⁵⁹*Gordon v. Levine*, 194 Mass. 418, 80 N. E. 505; *Cox v. Citizens' State Bank*, 13 Kan. 789, 85 Pac. 762; *Matlock v. Scheuerman (Or.)* 93 Pac. 823. Day following indorsement. *First Nat. Bank v. Currie*, 147 Mich. 72, 13 Det. Leg. N. 965, 110 N. W. 499. Construed to mean that the reasonable time ends with the next day after the date of the check, or of its delivery if subsequent to the date (*Dehoust v. Lewis*, 128 App. Div. 131, 112 N. Y. Supp. 559), and the fact that the payee indorsed the check to a third party does not extend the time as between the drawer and the payee (*Id.*). Presentment, or a forwarding for presentment, must be made within twenty-four hours after the issuance of the check. *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; *Smith v. Miller*, 43 N. Y. 171; *Schoolfield v. Moon*, 56 Tenn. (9 Heisk.) 171; *First Nat. Bank v. Alexander*, 84 N. C. 30; *Grange v. Reigh*, 93 Wis. 552, 67 N. W. 1130.

⁶⁰*Cox v. Citizens' State Bank*, 73 Kan. 789, 85 Pac. 762.

⁶¹For presentments held to have been made with reasonable diligence. See *Woodruff v. Plant*, 41 Conn. 344; *First Nat. Bank v. Buckhannon Bank*, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332; *Nebraska Nat. Bank v. Logan*, 35 Neb. 182, 52 N. W. 808; *Rosenthal v. Ehrlicher*, 154 Pa. 396, 26 Atl. 435; *Lloyd v. Osborne*, 92 Wis. 93, 65 N. W. 859. For unreasonable delay in presentment, see *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248; *Anderson v. Gill*, 79 Md. 312, 29 Atl. 527; *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864; *Carroll v. Sweet*, 9 Misc. 382, 30 N. Y. Supp. 204.

for payment is material and relevant,⁶² independent of the knowledge or want of knowledge thereof on the part of a party indorsing and negotiating the check or bill.⁶³ Thus, where checks were forwarded to various banks in accordance with the regular custom and usage of the business, sufficient diligence was exercised to charge the indorser, though demand might have been more promptly made if other and extraordinary means had been resorted to.⁶⁴

§ 190. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Delay in making presentment is excused when caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence.⁶⁵ When the cause of

⁶²Plover Savings Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29.

⁶³Plover Savings Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29. .

⁶⁴Plover Savings Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29. While in this case the checks were in effect practically negotiated to each succeeding bank, and hence comes within the rule as to presentment after the last negotiation, still the opinion would lead one to believe that the same result would have been reached had the checks simply been forwarded the succeeding banks for collection. *Id.* Negligence of holder of check in presenting it for payment cannot be predicated on the fact that check was forwarded by mail instead of by messenger. *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 605, 113 N. W. 481.

⁶⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 81); Ariz. (§ 3384); Ill. (§ 81); Kan. (§ 88); Md. (§ 100); Mich. (§ 83); Neb. (§ 81); N. Y. (§ 141); Ohio (§ 3173z); R. I. (§ 89); Wis. (§ 1678-11).

Mistake of postal clerk, see *Windham Bank v. Norton*, 22 Conn. 21. Bad weather, see *McDonald v. Mosher*, 23 Ill. App. 206; *Barker v. Parker*, 23 Mass. (6 Pick.) 80. Death of holder, see *Wilson v. Senier*, 14 Wis. 380. War, see *Hardin v. Boyce*, 59 Barb. (N. Y.) 425; *Lane v. Bank of West Tennessee*, 56 Tenn. (9 Heisk.) 419.

delay ceases to operate, presentment must be made with reasonable diligence.⁶⁶

§ 191. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for nonpayment was made, it must be presented not later than the day following its maturity;
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified for giving notice of dishonor.

Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for nonpayment was made, it must be presented not later than the day following its maturity.⁶⁷

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in the section dealing with the notice of dishonor.⁶⁸ The provisions excusing delay in presentment apply where there is delay in making presentment to the acceptor for honor or referee in case of need.⁶⁹

⁶⁶Same sections of negotiable instruments laws as last above cited.

⁶⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 168); Ariz. (§ 3471); Ill. (§ 167); Kan. (§ 175); Md. (§ 187); Mich. (§ 170); Neb. (§ 167); N. Y. (§ 287); Ohio (§ 3177-E); R. I. (§ 176); Wis. (§ 1681-25).

⁶⁸Subdivision 2, same sections of negotiable instruments laws as last above cited.

The section referred to in the text is § 104 for the negotiable instruments laws of Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., and Wyo., but should be section 112 of the Rhode Island law, section 123 of the Maryland law, section 175 of the New York law, and section 1678-34 of the Wisconsin law; Ariz. § 3407; Ill. § 103; Kan. § 111; Mich. § 106; Neb. § 103; Ohio

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§ 192. Presentment for payment is made at the proper place:

1. **Where a place of payment is specified in the instrument and it is there presented;**
2. **Where no place of payment is specified but the address of the person to make payment is given in the instrument and it is there presented;**
3. **Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;**
4. **In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.**

Where a place of presentment is specified in the instrument, it must be presented for payment there.⁷⁰ The note being payable on demand at a bank and before presentation the bank goes into

§ 3174v. The law as first adopted in New York has been amended so that the reference is now section 175 of that law. Laws 1898, c. 336, § 18. The sections referred to are treated in § 231 of this work.

⁶⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 169); Ariz. (§ 3472); Ill. (§ 168); Kan. (§ 176); Md. (§ 188); Mich. (§ 171); Neb. (§ 168); N. Y. (§ 288); Ohio (§ 3177f); R. I. (§ 177); Wis. (§ 1681-26).

The section referred to in the text § 81 for the negotiable instruments laws of Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., and Wyo., but should be section 89 of the Rhode Island law, section 100 of the Maryland law, section 141 of the New York Law, and section 1678-11 of the Wisconsin law; Ariz. § 3384; Ill. § 81; Kan. § 88; Mich. § 83; Neb. § 81; Ohio § 3173z. The law as first adopted in New York has been amended so that the reference is now to section 141 of that law. Laws 1898, c. 336, § 19. The sections referred to are treated in §§ 190, 191 of this work.

⁷⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 73); Ariz. (§ 3376); Ill. (§ 73);

the hands of a receiver, presentation at the bank is proper,⁷¹ but being a national bank, no demand for payment need be made on the receiver.⁷² Where a note is made payable at a designated branch office of a corporation, presentation at the corporation's principal office is insufficient.⁷³ If no place of payment is designated, but the address of the person to make payment is given in the instrument, it should be presented there.⁷⁴ If no place of payment is specified, and no address is given, the instrument should be presented at the place of business or residence of the person to make payment.⁷⁵ In any other case presentment is suffi-

Kan. (§ 80); Md. (§ 92); Mich. (§ 75); Neb. (§ 73); N. Y. (§ 133); Ohio (§ 3173r); R. I. (§ 81); Wis. (§ 1678-3).

Bank of the State v. Bank of Cape Fear, 35 N. C. (13 Ired. Law) 75; *Warren v. Briscoe*, 12 La. 472; *Townsend v. Chas. H. Heer Dry Goods Co.*, 85 Mo. 503; *Ferner v. Williams*, 37 Barb. (N. Y.) 9; *Arnold v. Dresser*, 90 Mass. (8 Allen) 435; *Apperson v. Bynum*, 45 Tenn. (5 Cold.) 341; *Bynum v. Apperson*, 56 Tenn. (9 Heisk.) 632. In the absence of custom authorizing it, a presentment at the office of a loan and trust company in a particular city is not a sufficient presentment of a note payable at any "bank" in such city. *Nash v. Brown*, 165 Mass. 384, 43 N. E. 180. But see statutory definition of "bank" in note 32, chapter XV. Where the specified place of payment is the agency of a banking company in a particular city, a presentment there has been sustained, though the agency had been removed shortly before the presentment. *Spann v. Batzell*, 1 Fla. 301, 46 Am. Dec. 346. So if the bank where a note is made payable fails before the maturity of the note, presentment at the old place of business is good. *Central Bank v. Allen*, 16 Me. 41. See, also, *Rienke v. Wright*, 93 Wis. 368, 67 N. W. 737; *Adams v. Leland*, 30 N. Y. 309. On question of diligence in presentment at place designated, see *Farnsworth v. Mullen*, 164 Mass. 112, 41 N. E. 131.

⁷¹*Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383.

⁷²*Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383.

⁷³*Iron Clad Mfg. Co. v. Sackin*, 59 Misc. 281, 110 N. Y. Supp. 161. This changes the law in New York. See *Brooks v. Higley*, 11 Hun (N. Y.) 235.

⁷⁴Subdivision 2, same sections of negotiable instruments laws as last above cited.

A holder who, within the knowledge of the maker, places the latter's address below his name on the note, is bound by a demand made at such place by a subsequent holder. *Farnsworth v. Mullen*, 164 Mass. 112, 41 N. E. 131.

⁷⁵Subdivision 3, same sections of negotiable instruments laws as last above cited.

cient if made to the person to make payment wherever he can be found, or if made at his last known place of business or residence.⁷⁶

MANNER.

§ 193. The instrument must be exhibited to the person from whom payment is demanded.

To render a presentment for payment sufficient, the instrument must be exhibited to the person from whom payment is demanded.⁷⁷ This rule has been stated as follows: "No valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in

Estes v. Tower, 102 Mass. 65; *Peoples' Nat. Bank v. Lutterloh*, 95 N. C. 495 (no address given). Presentment at maker's place of business without inquiring for his residence is not sufficient. *Talbot v. National Bank of the Commonwealth*, 129 Mass. 67. Diligence where no place is specified, see *Holtz v. Boppe*, 37 N. Y. 634; *Mason v. Prichard*, 56 Tenn. (9 Heisk.) 793.

⁷⁶Subdivision 4, same sections of negotiable instruments laws as last above cited.

Demand made on the maker while on the street is good, if he has no place of business, and does not object to the place of demand. *King v. Crowell*, 61 Me. 244; *Parker v. Kellogg*, 158 Mass. 90, 32 N. E. 1038. Place of execution of instrument as proper place for presentment, see *Wittkowski v. Smith*, 84 N. C. 671; *Hart v. Wills*, 52 Iowa, 56, 2 N. W. 619. The maker is presumed to reside in the state where the note is executed. *Herrick v. Baldwin*, 17 Minn. 209.

⁷⁷*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 74); Ariz. (§ 3377); Ill. (§ 74); Kan. (§ 81); Md. (§ 93); Mich. (§ 76); Neb. (§ 74); N. Y. (§ 134); Ohio (§ 3173s); R. I. (§ 82); Wis. (§ 1678-4).

Musson v. Lake, 45 U. S. (4 How.) 262, 11 Law. Ed. 103; *Arnold v. Dresser*, 90 Mass. (8 Allen) 435; *Shaw v. Reed*, 29 Mass. (12 Pick.) 132. But see *Whitwell v. Johnson*, 17 Mass. 449. Upon presentation and demand of payment, the maker can insist on the exhibition of the note as evidence of the holder's right to collect. *Gilpin v. Savage*, 60 Misc. 605, 112 N. Y. Supp. 802. Conditional refusal prior to a demand, accompanied by a production of the instrument, does not constitute dishonor. *Citizen's Bank v. First Nat. Bank*, 135 Iowa, 605, 113 N. W. 481.

case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence.”⁷⁸ The right of such person to an actual exhibition or production of the instrument may be waived by failing to ask for it, and refusing payment on other grounds.⁷⁹

DISPENSING WITH AND WAIVER OF PRESENTMENT.

§ 194. Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.

§ 195. A waiver of protest includes a waiver of presentment.

Presentment for payment is dispensed with if, after the exercise of reasonable diligence, presentment cannot be made.⁸⁰ This is the case where the person primarily liable cannot be found after diligent search.⁸¹ So, also, if payment is stopped by the drawer, or his funds are withdrawn, presentment is not necessary

⁷⁸Arnold v. Dresser, 90 Mass. (8 Allen) 435.

⁷⁹Legg v. Vinal, 165 Mass. 555, 43 N. E. 518; Waring v. Betts, 90 Va. 46, 17 S. E. 739; King v. Crowell, 61 Me. 244; Lockwood v. Crawford, 18 Conn. 361; Gilpin v. Savage, 60 Misc. 605, 112 N. Y. Supp. 802.

⁸⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 82); Ariz. (§ 3385); Ill. (§ 82); Kan. (§ 89); Md. (§ 101); Mich. (§ 84); Neb. (§ 82); N. Y. (§ 142); Ohio (§ 3174); R. I. (§ 90); Wis. (§ 1678-12).

Waring v. Betts, 90 Va. 46, 17 S. E. 739.

⁸¹Galpin v. Hard, 3 McCord (S. C.) 394; Adams v. Leland, 30 N. Y. 309; Ratcliff v. Planters' Bank, 34 Tenn. (2 Sneed) 425. But mere failure to find the maker of a note in the city where it was executed is not a good excuse. Haber v. Brown, 101 Cal. 445, 35 Pac. 1035. Nonresidence as excusing presentment, see Williams v. Bank of United States, 27 U. S. (2 Pet.) 96, 7 Law. Ed. 30; Moore v. Coffield, 12 N. C. (1 Dev. Law) 247.

to charge him.⁸² But the mere insolvency of the person primarily liable will not excuse presentment.⁸³ Presentment is also dispensed with where the drawee is a fictitious person.⁸⁴

Presentment may also be waived,⁸⁵ and the waiver may be express, by parol,⁸⁶ or writing,⁸⁷ with full knowledge of the facts,⁸⁸ or it may be implied,⁸⁹ and such waiver may consist of conduct,⁹⁰ or of acts and declarations of the indorser, calculated to mislead the holder, put him off his guard, or induce him to forbear taking the necessary steps to charge such indorser.⁹¹ Whether the acts and declarations have such effect is a question of fact.⁹²

The exceptions above noted are exclusive.⁹³

⁸²*Rhett v. Poe*, 43 U. S. (2 How.) 457, 11 Law. Ed. 167; *Purchase v. Mattison*, 13 N. Y. Super. Ct. (6 Duer) 587.

⁸³*Lee Bank v. Spencer*, 47 Mass. (6 Metc.) 308; *Manning v. Lyon*, 70 Hun, 345, 24 N. Y. Supp. 265; *Bassenhorst v. Vilby*, 45 Ohio St. 333, 13 N. E. 75; *Cedar Falls Co. v. Wallace Brothers*, 83 N. C. 225.

⁸⁴Subdivision 2, same sections of negotiable instruments laws as last above cited.

⁸⁵Subdivision 3, same sections of negotiable instruments laws as last above cited.

Robinson v. Barnett, 19 Fla. 670. See, also, *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545, where it was held that an indorser who waived notice of nonpayment after dishonor, and paid the note, could recover from the maker.

⁸⁶*Porter v. Kemble*, 53 Barb. (N. Y.) 467; *Maples v. Traders' Deposit Bank*, 15 Ky. Law Rep. 879.

⁸⁷*Portsmouth Sav. Bank v. Wilson*, 5 App. D. C. 8; *City Sav. Bank v. Hopson*, 53 Conn. 453, 5 Atl. 601.

⁸⁸*Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329.

⁸⁹*Markland v. McDaniel*, 51 Kan. 350, 20 L. R. A. 96; *Cady v. Bradshaw*, 116 N. Y. 188, 22 N. E. 371; *Sieger v. Second Nat. Bank*, 132 Pa. 307, 19 Atl. 217; *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145.

⁹⁰*Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886.

⁹¹*Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145.

⁹²*Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145. Implied waiver where indorser was president of corporation and participated in having latter adjudged a bankrupt. *J. W. O'Bannon Co. v. Curran*, 129 App. Div. 90, 113 N. Y. Supp. 359.

⁹³*Moore v. Alexander*, 63 App. Div. 100, 71 N. Y. Supp. 420; *J. W. O'Bannon Co. v. Curran*, 129 App. Div. 90, 113 N. Y. Supp. 359. Alters New York rule that failure to present does not discharge in the absence

Waiver of protest.

A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor,⁹⁴ and it has been held that a waiver of "notice of protest" was a waiver of protest and consequently of demand and presentment.⁹⁵

DISHONOR.**§ 196. The instrument is dishonored by nonpayment when:**

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

The instrument is dishonored by nonpayment if it is duly presented for payment, and payment is refused or cannot be obtained, or presentment is excused, and the instrument is overdue and unpaid.⁹⁶

of injury. *J. W. O'Bannon Co. v. Curran*, 129 App. Div. 90, 113 N. Y. Supp. 359. Lack of funds no defense. *First Nat. Bank v. Currie*, 147 Mich. 72, 13 Det. Leg. N. 965, 110 N. W. 499.

⁹⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 111); Ariz. (§ 3414); Ill. (§ 110); Kan. (§ 118); Md. (§ 130); Mich. (§ 113); Neb. (§ 110); N. Y. (§ 182); Ohio (§ 3175b); R. I. (§ 119); Wis. (§ 1678-41).

Bank of Montpelier v. Montpelier Lumber Co. (Idaho) 102 Pac. 685.

⁹⁵*Parr v. City Trust, Safe Deposit & Surety Co.*, 95 Md. 291, 52 Atl. 512.

⁹⁶Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 83); Ariz. (§ 3386); Ill. (§ 83); Kan. (§ 90); Md. (§ 102); Mich. (§ 85); Neb. (§ 83); N. Y. (§ 143); Ohio (§ 3174a); R. I. (§ 91); Wis. (§ 1678-13).

- § 197. Subject to the provisions of the act, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.**

Subject to the other provisions of the negotiable instruments laws as to the liability of persons secondarily liable when an instrument is dishonored by nonpayment, an immediate right of recourse against all parties secondarily liable thereon accrues to the holder.⁹⁷

- § 198. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored for nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.**

The drawer or indorser of a bill may insert therein a referee in case of need in case the bill is dishonored by nonpayment.⁹⁸ It is optional with the holder to resort to such referee,⁹⁹ but if he does, and the latter pays, he has recourse against the drawer for the full amount.¹⁰⁰

⁹⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 84); Ariz. (§ 3387); Ill. (§ 84); Kan. (§ 91); Md. (§ 103); Mich. (§ 86); Neb. (§ 84); N. Y. (§ 144); Ohio (§ 3174b); R. I. (§ 92); Wis. (§ 1678-14).

Parties to negotiable instruments held to be guarantors and not indorsers. See *Glickauf v. Kaufmann*, 73 Ill. 378; *Nelson v. Harrington*, 82 Mass. (16 Gray) 139; *Harding v. Waters*, 74 Tenn. (6 Lea) 324. But see *Pollard v. Huff*, 44 Neb. 892, 63 N. W. 58. Cosureties not guarantors, see *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. 237. In case of a mere guaranty of collection, the holder must first pursue remedies against the principal debtor. *Summers v. Barrett*, 65 Iowa, 292, 21 N. W. 646; *Pach v. Frink*, 10 Iowa, 193.

⁹⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 131); Ariz. (§ 3434); Ill. (§ 130); Kan. (§ 138); Md. (§ 150); Mich. (§ 133); Neb. (§ 130); N. Y. (§ 215); Ohio (§ 3175v); R. I. (§ 139); Wis. (§ 1680e).

⁹⁹Same sections negotiable instruments laws last cited.

¹⁰⁰Chit. Bills, 186; Story, Bills, § 65.

CHAPTER XIII.

PROTEST OF BILLS OF EXCHANGE.

- § 199. Necessity.
- § 200. Dishonor of Bill by Acceptor For Honor.
- § 201. Protest of Bill for Nonacceptance and Nonpayment.
- § 202. Nature and Sufficiency of Protest.
- § 203. By Whom Made.
- § 204. Time of Making Protest—Extending Notes.
- § 205. Protest Before Maturity Where Acceptor is Insolvent.
- § 206. Protest of Bill Accepted For Honor.
- § 207. Place of Protest.
- § 208. Protest of Lost or Detained Bill.
- § 209. Waiver.
- § 210. Excuses For Failure or Delay to Protest.
- § 211. Damages Recoverable in Case of Protest.

NECESSITY.

- § 199. **Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment, as the case may be, but protest is not required except in the case of foreign bills of exchange appearing on their face to be such. Failure to protest such a foreign bill discharges the drawer and indorsers.**
- § 200. **When the bill is dishonored by the acceptor for honor, it must be protested for nonpayment by him.**
- § 201. **A bill which has been protested for nonacceptance may be subsequently protested for nonpayment.**

Foreign bills must be protested for nonacceptance or nonpayment.

Where a foreign bill which shows on its face that it is such is dishonored by nonacceptance, it must be duly protested for non-

acceptance; and it must be duly protested for nonpayment if it has been dishonored by nonpayment, and has not been previously dishonored for nonacceptance.¹ Negotiable instruments other than foreign bills may be, but need not be, protested for nonacceptance or nonpayment.² But as the notarial certificate of protest is generally made *prima facie* evidence of the facts of dishonor and notice which it recites, it is often convenient to protest instruments which are not foreign bills. If a foreign bill is not protested as required by the above rules, the drawer and indorsers are discharged.³

¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 152); Ariz. (§ 3455); Ill. (§ 151); Kan. (§ 159); Md. (§ 17); Mich. (§ 154); Neb. (§ 151); N. Y. (§ 260); Ohio (§ 3176p); R. I. 160; Wis. (§ 1681-9).

Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 121 Am. St. Rep. 858.

As to necessity of protesting dishonored foreign bill, see *Commercial Bank v. Varnum*, 3 Lans. (N. Y.) 86, 49 N. Y. 269; *Gardner v. Bank of Tennessee*, 31 Tenn. (1 Swan) 420; *Joseph v. Salomon*, 19 Fla. 623; *Union Bank v. Hyde*, 19 U. S. (6 Wheat.) 572, 5 Law. Ed. 169. A dishonored inland bill need not be protested. *McCord v. Curlee*, 59 Ill. 221; *Townsend v. Auld*, 8 Misc. 516, 28 N. Y. Supp. 746; *Hubbard v. Troy*, 24 N. C. (2 Ired.) 134; *Shaw v. McNeill*, 95 N. C. 535. A dishonored check need not be protested. *Wittich v. First Nat. Bank*, 20 Fla. 843, 51 Am. Rep. 631; *Henshaw v. Root*, 60 Ind. 220; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. 239.

²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 118); Ariz. (§ 3421); Ill. (§ 117); Kan. (§ 125); Md. (§ 137); Mich. (§ 120); Neb. (§ 117); N. Y. (§ 189); Ohio (§ 3175i); R. I. (§ 126); Wis. (§ 1678-48).

Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955. At common law and under the Massachusetts statute, no formal protest is needed to hold the indorsers; it is enough if there has been proper demand upon the maker, a refusal by him to make payment, and reasonable notice of these facts given the indorser. *Demelman v. Brazier*, 198 Mass. 458, 84 N. E. 856.

³Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 152); Ariz. (§ 3455); Ill. (§ 151); Kan. (§ 159); Md. (§ 171); Mich. (§ 154); Neb. (§ 151); N. Y. (§ 260); Ohio (§ 3176p); R. I. (§ 160); Wis. (§ 1681-9).

Dishonor of bill by acceptor for honor.

When the bill is dishonored by the acceptor for honor, it must be protested for nonpayment by him.⁴

Protest both for nonacceptance and nonpayment.

The fact that a bill has been protested for nonacceptance will not prevent a subsequent additional protest for nonpayment.⁵

NATURE AND SUFFICIENCY OF PROTEST.

§ 202. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify;

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

In its broadest sense, the word "protest" includes all the steps necessary to charge the indorsers.⁶ Technically, however, the

⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 170); Ariz. (§ 3473); Ill. (§ 169); Kan. (§ 177); Md. (§ 189); Mich. (§ 172); Neb. (§ 169); N. Y. (§ 289); Ohio (§ 3177g); R. I. (§ 178); Wis. (§ 1681-27).

⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 157); Ariz. (§ 3460); Ill. (§ 156); Kan. (§ 164); Md. (§ 176); Mich. (§ 159); Neb. (§ 156); N. Y. (§ 265); Ohio (§ 3176v); R. I. (§ 165); Wis. (§ 1681-14).

⁶White v. Keith, 97 Ala. 668, 12 So. 611; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Wolford v. Andrews, 29 Minn. 250, 13 N. W. 167, 43 Am. Rep. 201; Townsend v. Lorain Bank, 2 Ohio St. 345; Sherman v. Ecker, 59 Misc. 216, 110 N. Y. Supp. 265, rvg. 58 Misc. 456, 109 N. Y. Supp. 678.

protest is a formal document annexed to the bill, or containing a copy of the bill,⁷ under the hand and seal⁸ of the notary making it, and specifying the time and place of presentment,⁹ the fact that presentment was made, and the manner thereof,¹⁰ the cause or reason for protesting the bill,¹¹ the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.¹² A notarial certificate of protest failing to show in what post office notice to indorser was deposited and to what post office it was sent has been held insufficient.¹³

⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 153); Ariz. (§ 3456); Ill. (§ 152); Kan. (§ 160); Md. (§ 172); Mich. (§ 155); Neb. (§ 152); N. Y. (§ 261); Ohio (§ 3176q); R. I. (§ 161); Wis. (§ 1681-10).

See *Colms v. Bank of Tennessee*, 63 Tenn. (4 Baxt.) 422, where it was held that a failure to copy the instrument in the formal protest was cured by prefixing a copy, and referring to such copy in the protest. See, also, *Townsend v. Lorain Bank*, 2 Ohio St. 345.

⁸Same sections negotiable instruments laws last cited.

See *Jordon v. Long*, 109 Ala. 414, 19 So. 843; *Richards v. Boller*, 51 How. (N. Y.) 371, 6 Daly, 460. And see *Bank of Cooperstown v. Woods*, 28 N. Y. 561.

⁹Subdivision 1, same sections of negotiable instruments laws as last above cited.

Gardner v. Bank of Tennessee, 31 Tenn. (1 Swan) 420; *People's Bank v. Brooke*, 31 Md. 7. See, also, *Brooke v. Higby*, 11 Hun (N. Y.) 235, in which it was held that the notarial certificate failed to show that the draft was presented at the place where it was made payable.

¹⁰Subdivision 2, same sections of negotiable instruments laws as last above cited.

A protest which does not show presentation to the drawee is not admissible in evidence in an action against an indorser. *Musson v. Lake*, 45 U. S. (4 How.) 262, 11 Law. Ed. 103.

¹¹Subdivision 3, same sections of negotiable instruments laws as last above cited.

¹²Subdivision 4, same sections of negotiable instruments laws as last above cited.

¹³*Mason v. Kilcourse*, 71 N. J. Law, 472, 59 Atl. 21.

Conclusiveness of certificate.

A properly executed certificate of protest is, in most states, prima facie evidence of the facts therein recited,¹⁴ but may be contradicted by other evidence,¹⁵ the question being for the jury.¹⁶

BY WHOM MADE.**§ 203. Protest may be made by:**

1. **A notary public; or**
2. **By any respectable resident of the place where the bill is dishonored in the presence of two or more credible witnesses.**

Protest of a bill may, of course, be made by a notary,¹⁷ and it is customary to have a notary make the protest, but it may also

¹⁴See *Martin v. Brown*, 75 Ala. 442; *Ricketts v. Pendleton*, 14 Md. 320; *Legg v. Vinal*, 165 Mass. 555, 43 N. E. 518; *Bettis v. Schrieber*, 31 Minn. 329, 17 N. W. 863; *McAndrew v. Radway*, 34 N. Y. 511; *Rosson v. Carroll*, 6 Pickle, 90; *Central Bank v. St. John*, 17 Wis. 157. See, also, *Sims v. Hundley*, 47 U. S. (6 How.) 1, 12 Law. Ed. 580. Certificate of protest stating that indorser was duly notified of dishonor, the indorser has the burden of showing that he did not receive notice. *Zollner v. Moffitt*, 222 Pa. 644, 72 Atl. 285.

¹⁵*Meise v. Newman*, 76 Hun, 341, 27 N. Y. Supp. 708; *Adams v. Wright*, 14 Wis. 408; *Demelman v. Brazier*, 198 Mass. 458, 84 N. E. 856.

¹⁶*Demelman v. Brazier*, 198 Mass. 458, 84 N. E. 856.

¹⁷*Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo.* (§ 154); *Ariz.* (§ 3457); *Ill.* (§ 153); *Kan.* (§ 161); *Md.* (§ 173); *Mich.* (§ 156); *Neb.* (§ 153); *N. Y.* (§ 262); *Ohio* (§ 3176r); *R. I.* (§ 162); *Wis.* (§ 1681-11).

Protest may be made by the notary's clerk, if that is the custom at the place of protest. *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. 269; *Munroe v. Woodruff*, 17 Md. 159; *Sussex Bank v. Baldwin*, 17 N. J. Law, 487. In the absence of well defined custom, the notary's clerk or deputy cannot make the protest for him. *Cribbs v. Adams*, 79 Mass. (13 Gray) 597; *Onondaga Bank v. Bates*, 3 Hill (N. Y.) 53.

be made by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.¹⁸ By the law merchant, a notarial protest need not be made in the presence of witnesses.¹⁹

TIME OF PROTEST.

- § 204. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused. When the bill has been duly noted, the protest may be subsequently extended as of the date of the noting.
- § 205. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.
- § 206. Where a dishonored bill has been accepted for honor *supra* protest, or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need.

Time of making protest—Extending notes.

Protest must be made on the day the bill is dishonored, unless protest is excused.²⁰ The notary need not, however, make out

¹⁸Same sections of negotiable instruments laws as last above cited.

This provision is taken from the English Bills of Exchange Act 1882 (§ 45).

¹⁹Bradford v. Cooper, 1 La. Ann. 325.

²⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 155); Ariz. (§ 3458); Ill. (§ 154); Kan. (§ 162); Md. (§ 174); Mich. (§ 157); Neb. (§ 154); N. Y. (§ 263); Ohio (§ 3176s); R. I. (§ 163); Wis. (§ 1681-12).

Commercial Bank of Kentucky v. Barksdale, 36 Mo. 563. A certificate of protest made four and one-half years after protest is not proof of notice of dishonor. Boggs v. Branch Bank at Mobile, 10 Ala. 970.

the formal protest at that time. He may make a note of the facts, and draw up or extend his formal protest afterwards.²¹ The rule has been stated as follows: "It seems to be clearly established by the general current of authority that the protest must be made on the same day with the presentment and demand, though a noting of the protest on the bill itself may be regarded as an incipient step toward a protest which may be completed afterwards, at any time, by drawing up the protest in form."²² This formal protest or extension of the original noting takes date as of the date of the noting.²³ In order that delay may defeat recovery by a bona fide holder, the drawer must show that he suffered loss thereby.²⁴

Protest before maturity where acceptor is insolvent.

The holder of a bill may cause it to be protested before maturity for better security against the drawer and indorsers, if, before the maturity of the bill, the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors.²⁵

Protest of bill accepted for honor.

Where a dishonored bill has been accepted for honor *supra* protest, or contains a reference in case of need, it must be pro-

²¹Bailey v. Dozier, 47 U. S. (6 How.) 23, 12 Law. Ed. 587; First Nat. Bank v. Crittenden, 2 Thomp. & C. (N. Y.) 118.

²²Commercial Bank of Kentucky v. Barksdale, 36 Mo. 563.

²³Same sections of negotiable instruments laws as last above cited.

See Chatham Bank v. Allison, 15 Iowa, 357; Union Bank v. Holcomb, 24 Tenn. (5 Humph.) 583.

²⁴Cox v. Citizens' State Bank, 73 Kan. 789, 85 Pac. 762, 4 L. R. A. (N. S.) 547.

²⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 158); Ariz. (§ 3461); Ill. (§ 157); Kan. (§ 165); Md. (§ 177); Mich. (§ 160); Neb. (§ 157); N. Y. (§ 266); Ohio (§ 3176v); R. I. (§ 166); Wis. (§ 1681-15).

tested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need.²⁶

PLACE OF PROTEST.

§ 207. **A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by nonacceptance, it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.**

Ordinarily, a bill must be protested at the place where it is dishonored;²⁷ but where a bill is drawn payable at the place of business or residence of a person other than the drawee, and has been dishonored by nonacceptance, it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.²⁸

PROTEST OF LOST OR DETAINED BILL.

§ 208. **Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.**

Where a bill is lost or destroyed, or wrongly detained from

²⁶Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 167); Ariz. (§ 3470); Ill. (§ 166); Kan. (§ 174); Md. (§ 186); Mich. (§ 169); Neb. (§ 166); N. Y. (§ 286); Ohio (§ 3177d); R. I. (§ 175); Wis. (§ 1681-24).

²⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 156); Ariz. (§ 3459); Ill. (§ 155); Kan. (§ 163); Md. (§ 175); Mich. (§ 158); Neb. (§ 155); N. Y. (§ 264); Ohio (§ 3176t); R. I. (§ 164); Wis. (§ 1681-13).

²⁸Same sections of negotiable instruments laws as last above cited.

the person entitled to hold it, protest may be made on a copy or written particulars thereof.²⁹

WAIVER.

§ 209. Protest may be waived.

Protest may be waived by the indorsers or other parties secondarily liable,³⁰ even after expiration of proper time for the protest to be made,³¹ and a waiver of protest is deemed to be a waiver of presentment and notice of dishonor.³² A new consid-

²⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 160); Ariz. (§ 3463); Ill. (§ 159); Kan. (§ 167); Md. (§ 179); Mich. (§ 162); Neb. (§ 159); N. Y. (§ 268); Ohio (§ 3176x); R. I. (§ 168); Wis. (§ 1681-17).

This is section 51, subd. 8, of the English Bills of Exchange Act 1882. See *Hinsdale v. Miles*, 5 Conn. 331, where it was held that presentment of copy of lost note and notice of dishonor was sufficient, and *Scott v. Meeker*, 20 Hun (N. Y.) 161, where it was held that the accidental destruction of a check by fire excused presentment for payment. As to the necessity of indemnity against subsequent presentation of lost paper by a bona fide holder, see *McGregory v. Gregory*, 107 Mass. 543, and *Armstrong v. Lewis*, 14 Minn. 406, where it was held that a receiver suing on a note must produce it, or prove it to have been lost or destroyed, and give bond accordingly.

³⁰*Mauney v. Coit*, 80 N. C. 300. It may be waived by one partner. *Seldner v. Mt. Jackson Nat. Bank*, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190. One becoming a partner to paper containing a waiver written in by the maker is bound thereby. *Iowa Val. State Bank v. Sigstad*, 96 Iowa, 491, 65 N. W. 407; *Hoover v. McCormick*, 84 Wis. 215, 54 N. W. 505. The last cited case also holds that, by waiving demand and notice, an indorser promises to pay absolutely if the maker does not. Indorsers waive protest of destroyed note by stating that payment will be made, after being informed of the destruction. *Roch v. London*, 24 Misc. 384, 53 N. Y. Supp. 261.

³¹*Burgettstown Nat. Bank v. Nill*, 213 Pa. 456, 63 Atl. 186, 110 Am. St. Rep. 554, 3 L. R. A. (N. S.) 1079.

³²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 111); Ariz. (§ 3414); Ill.

eration is not necessary for a waiver of protest,³³ but the weight of authority requires that the waiver should be in writing.³⁴

EXCUSES FOR FAILURE OR DELAY TO PROTEST.

§ 210. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

It is a general rule that protest is dispensed with by any circumstances which would dispense with notice of dishonor.³⁵ This rule applies to any delay caused by circumstances beyond the

(§ 110); Kan. (§ 118); Md. (§ 130); Mich. (§ 113); Neb. (§ 110); N. Y. (§ 182); Ohio (§ 3175b); R. I. (§ 119); Wis. (§ 1678-41).

The rule is also recognized in the following cases: *Union Bank v. Hyde*, 19 U. S. (6 Wheat.) 572, 5 Law. Ed. 169; *Shaw v. McNeill*, 95 N. C. 535; *Wilkie v. Chandon*, 1 Wash. 355; *Johnson v. Parsons*, 140 Mass. 173, 4 N. E. 196, where the words used were "hereby waive protest," and it did not appear that the protest was necessary to hold the indorser making the waiver. In *Cooke v. Pomeroy*, 65 Conn. 466, 32 Atl. 935, it was held that an indorser expressly waiving notice of protest was liable, though demand was not made on the maker, nor notice given, for 14 years after delivery of the note.

³³*Robinson v. Barnett*, 19 Fla. 670, 45 Am. Rep. 24; *Burgettstown Nat. Bank v. Nill*, 213 Pa. 456, 63 Atl. 186, 110 Am. St. Rep. 554, 3 L. R. A. (N. S.) 1079.

³⁴*Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742, and cases cited. But see *Boyd v. Cleveland*, 21 Mass. (4 Pick.) 525. As to what expressions amount to express written waiver, see *Savings Bank v. Fisher* (Cal.) 41 Pac. 490; *Portsmouth Sav. Bank v. Wilson*, 5 App. D. C. 8.

³⁵*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 159); Ariz. (§ 3462); Ill. (§ 158); Kan. (§ 166); Md. (§ 178); Mich. (§ 161); Neb. (§ 158); N. Y. (§ 267); Ohio (§ 3176w); R. I. (§ 167); Wis. (§ 1681-16).

control of the holder, and not imputable to his default, misconduct, or negligence, but the bill must in every case be protested within a reasonable time after the cause of delay ceases to operate.³⁶ A state of war rendering protest impossible would excuse a failure to protest,³⁷ but protest must be made within a reasonable time after the close of the war, and the resumption of commercial relations.³⁸ Protest is also excused if the drawer has instructed the drawee not to pay,³⁹ or, after issuing the bill or order, has withdrawn or intercepted the funds out of which it was to have been paid.⁴⁰

DAMAGES RECOVERABLE IN CASE OF PROTEST.

§ 211. In some states damages are recoverable in case of protest.

While ordinarily protest fees are recoverable in a suit on the note on the common counts,⁴¹ still the majority of the negotiable instruments laws do not provide for the damages recoverable in case of protest; but the Wisconsin law provides that where any bill of exchange drawn or indorsed within the state, and payable without the limits of the United States, shall be duly protested for nonacceptance or nonpayment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the

³⁶Same sections of negotiable instruments laws as last above cited.

For provisions of charter of Greater New York as to presentment and protest of commercial paper during an epidemic in city, see ante, chapter VII, note 29.

³⁷House v. Adams, 48 Pa. St. 261, 86 Am. Dec. 588. And see Peters v. Hobbs, 25 Ark. 67, 91 Am. Dec. 529; Bynum v. Apperson, 56 Tenn. (9 Heisk.) 632. But see United States v. Barker, Fed. Cas. No. 14,519.

³⁸James v. Wade, 21 La. Ann. 548; Lane v. Bank of West Tennessee, 56 Tenn. (9 Heisk.) 419.

³⁹Neederer v. Barber, Fed. Cas. No. 10,079; Manning v. Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67. See, also, Child v. Moore, 6 N. H. 93.

⁴⁰See Rhett v. Poe, 43 U. S. (2 How.) 457, 11 Law. Ed. 167; Lilley v. Miller, 2 Nott & McC. (S. C.) 257.

⁴¹First Nat. Bank of El Paso v. Miller, 235 Ill. 135, 85 N. E. 312.

same at the current rate of exchange at the time of demand, and damages at the rate of five per cent upon the contents thereof, together with the interest on said contents, to be computed from the date of the protest, and that said amounts shall be in full of all damages, charges, and expenses.⁴² The Wisconsin law further provides that if any bill of exchange drawn upon any person or corporation out of the state, but within some state or territory of the United States, shall be duly protested for nonacceptance or nonpayment, the drawer or indorser thereof, after due notice, "shall pay said bill, with legal interest, according to its tenor, and five per cent damages, together with costs and charges of protest."⁴³

⁴²Negotiable Inst. Law, § 1682.

⁴³Negotiable Inst. Law, § 1683.

In the states, other than Wisconsin, that have adopted the negotiable instruments law, the matter of damages on protest is regulated by other statutes. Colorado, Mills Ann. St. §§ 241, 242; Connecticut, Gen. St. 1864; District of Columbia, Comp. St. c. 8, §§ 11, 13; Maryland, Pub. Gen. Laws, art. 13, §§ 1, 4; Massachusetts, Pub. St. c. 77, §§ 18, 20, 21; New York, 1 Rev. St. p. 770, §§ 18, 23; North Carolina, Code, § 48; North Dakota, Rev. Code, §§ 4956, 4957; Oregon, Hills Ann. Laws, §§ 3195, 3196; Rhode Island, Pub. St. c. 166, §§ 1, 3; Tennessee, Code, §§ 3512, 3513; Virginia, Code, § 2851.

CHAPTER XIV.

NOTICE OF DISHONOR.

- § 212. Necessity.
- § 213. When Need Not be Given Drawer.
- § 214. When Need Not be Given Indorser.
- § 215. By Whom Given.
- § 216. May be Given by Agent.
- § 217. Notice Where Instrument is in Agent's Hands.
- § 218. Parties Protected—Notice Given by or on Behalf of Holder.
- § 219. Same—Notice Given by or on Behalf of Party Entitled to Give Notice.
- § 220. To Whom Given.
- § 221. When Parties Are Dead.
- § 222. When Parties are Partners.
- § 223. Joint Parties Not Partners.
- § 224. Notice to Bankrupt or Insolvent.
- § 225. Form and Requisites.
- § 226. Sufficiency of Terms and Effect of Misdescription.
- § 227. How Given.
- § 228. By Mail.
- § 229. Time Within Which Notice Must Be Given.
- § 230. Parties Residing in the Same Place.
- § 231. Parties Residing in Different Places.
- § 232. Notice to Antecedent Party.
- § 233. Notice to Principal by Agent.
- § 234. Place Where Notice Must be Sent.
- § 235. Actual Receipt Sufficient.
- § 236. Dispensing With Notice.
- § 237. Instruments Dishonored by Nonacceptance
- § 238. Waiver of Notice.
- § 239. Waiver of Protest.
- § 240. Parties Affected by Waiver.
- § 241. Excusable Delay.
- § 242. Effect of Omission to Give Notice.

NECESSITY.

§ 212. Except as herein otherwise stated, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

As a general rule, where a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser,¹ and any drawer or indorser to whom such notice is not given is discharged.² The fact that the holder is excused from presenting the note for payment does not relieve him from the duty of giving notice of dishonor if he wishes to hold an indorser.³ The burden of proving that due notice was given is on the holder.⁴

¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 89); Ariz. (§ 3392); Ill. (§ 88); Kan. (§ 96); Md. (§ 108); Mich. (§ 91); Neb. (§ 88); N. Y. (§ 160); Ohio (§ 3174g); R. I. (§ 97); Wis. (§ 1678-19).

Bank of Vergennes v. Cameron, 7 Barb. (N. Y.) 143; Long v. Stephenson, 72 N. C. 569.

²Same sections of negotiable instruments laws as last above cited.

Allen v. Eldred, 50 Wis. 132, 6 N. W. 565; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690. Drawer. Bacigalupo v. Parrilli, 112 N. Y. Supp. 1040. Indorsers. Deahy v. Cloquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; J. W. Perry Co. v. Taylor Bros., 148 N. C. 362, 62 S. E. 423; Moore v. Alexander, 63 App. Div. 100, 71 N. Y. Supp. 420; Guttman v. Abbott, 110 N. Y. Supp. 376; Galbraith v. Shepard, 43 Wash. 698, 86 Pac. 1113; First Nat. Bank v. Currie, 147 Mich. 72, 13 Det. Leg. N. 965, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 1698; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886.

Complaint must allege notice or excuse. Ewald v. Faulhaber Stable Co., 55 Misc. 275, 105 N. Y. Supp. 114.

³Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007.

⁴In the absence of proof of notice of dishonor given drawer, judgment for plaintiff cannot be sustained. Kuflick v. Glasser, 114 N. Y. Supp. 870. The indorser alleging in his answer that no notice of dishonor was given, the burden is on the holder to show that due notice was

Same—Notice to guarantor or surety.

As to the right of a guarantor to notice, it has been said, after a careful review of the authorities: "We conclude the rule to be that a guarantor (whose indorsement is not in blank), who is not a party to the note, is liable at the suit of the payee, without any proof of demand and notice of nonpayment, or use of diligence against the maker. If, however, in an action by the payee against the guarantor, the guarantor can show affirmatively that he has sustained damages from the want of such notice or diligence, he has a right to make such showing as a defense pro tanto to the plaintiff's action."⁵ The court in that case also deduces the following conclusion from the opinion of the court in an early case: "That, where the maker of a note is solvent at its maturity, notice of nonpayment should be given to the guarantor, and that the latter, under such circumstances, may avail himself of the want of notice of nonpayment; but it places the burden of proving solvency and of injury from want of notice upon the guarantor."⁶

In a case arising under the negotiable instruments act, a surety was held not discharged by failure to give him notice.⁷

WHEN NOTICE NEED NOT BE GIVEN DRAWER.**§ 213. Notice of dishonor is not required to be given to the drawer in either of the following cases:**

given. *Fuller Buggy Co. v. Waldron*, 112 App. Div. 814, 99 N. Y. Supp. 561.

⁵*Sabin v. Harris*, 12 Iowa, 87. See, also, *Heaton v. Hulbert*, 3 Scam. (Ill.) 489. Where the guaranty of a note is absolute, no demand or exhaustion of the maker is required, nor any notice required of acceptance or default. *Elgin City Banking Co. v. Hall* (Tenn.) 108 S. W. 1068. Whether the guaranty of a note stipulates that the maker will pay, or whether it stipulates that the guarantor will pay, the undertaking is absolute, whether the maker is solvent or not, and the guarantor may pay or see that it is paid. *Id.*

⁶*Gibbs v. Cannon*, 9 Serg. & R. (Pa.) 198, 11 Am. Dec. 699.

⁷*Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875.

1. When the drawer and drawee are the same person;
2. When the drawee is a fictitious person or a person not having capacity to contract;
3. When the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

Notice of dishonor need not be given to the drawer in the following cases: Where the drawer and the drawee is the same person;⁸ where the drawee is a fictitious person, or a person not having capacity to contract;⁹ where the drawer is the person to whom the instrument is presented for payment;¹⁰ where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;¹¹ and where the drawer has countermanded payment.¹²

⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 114); Ariz. (§ 3417); Ill. (§ 113); Kan. (§ 121); Md. (§ 133); Mich. (§ 116); Neb. (§ 113); N. Y. (§ 185); Ohio (§ 3175e); R. I. (§ 122); Wis. (§ 1678-44).

Fairchild v. Ogdensburgh, C. & R. Co., 15 N. Y. 337, 69 Am. Dec. 606; Chicago, C. & L. R. Co. v. West, 37 Ind. 211.

⁹Subdivision 2 of same sections of negotiable instruments laws as last above cited.

¹⁰Subdivision 3, same sections of negotiable instruments laws as last above cited.

Adler v. Levinson, 65 Misc. 514, 120 N. Y. Supp. 67.

¹¹Subdivision 4, same sections of negotiable instruments laws as last above cited.

As where drawer has no funds in hands of drawee. Culver v. Marks, 122 Ind. 554, 23 N. E. 1068, 17 Am. St. Rep. 377, 7 L. R. A. 489; Emery v. Hobson, 63 Me. 32; Rhett v. Poe, 43 U. S. (2 How.) 457; Cassel v. Regierer, 114 N. Y. Supp. 601. But see Life Ins. Co. v. Pendleton, 112 U. S. 708, 28 Law. Ed. 866, holding that presentment is necessary, even though the drawer has no funds in the hands of the drawee, if he has

WHEN NOTICE NEED NOT BE GIVEN INDORSER.

§ 214. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

Similar rules apply to indorsers, and notice is not required to be given to an indorser if the drawee is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed;¹³ nor is it required if the indorser is the person to whom the instrument is presented for payment,¹⁴ nor where the instrument was made or accepted for

reason to believe that the bill will be accepted. As to the right of the drawer to notice of dishonor where the bill was accepted for his accommodation, see *McLaren v. Marine Bank of Georgia*, 52 Ga. 131; *Barbaroux v. Waters*, 44 Mass. (3 Metc.) 304; *Ross v. Bedell*, 12 N. Y. Super Ct. (5 Duer) 462. An accommodation drawer is entitled to notice. *Sherrod v. Rhodes*, 5 Ala. 683; *Merchants' Bank v. Easley*, 44 Mo. 286, 100 Am. Dec. 287.

¹²Subdivision 5, same sections of negotiable instruments laws as last above cited.

Jacks v. Darrin, 3 E. D. Smith (N. Y.) 557; *Purchase v. Mattison*, 13 N. Y. Super. Ct. (6 Duer) 587; *Lilley v. Miller*, 2 Nott & McC. (S. C.) 257.

¹³*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 115); Ariz. (§ 3418); Ill. (§ 114); Kan. (§ 122); Md. (§ 134); Mich. (§ 117); Neb. (§ 114); N. Y. (§ 186); Ohio (§ 3175f); R. I. (§ 123); Wis. (§ 1678-45).

¹⁴Subdivision 2, same sections of negotiable instruments laws as last above cited.

his accommodation.¹⁵ But an indorser who signs for the accommodation of another party to the paper is entitled to notice.¹⁶

BY WHOM GIVEN.

- § 215. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.
- § 216. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.
- § 217. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal.

Notice of dishonor may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, on taking it up, would have a right to reimbursement from the party to whom notice is

In re Swift, 106 Fed. 65.

See *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653, holding that if the indorser has full control of the payer's business, and his relation to him is such that it is his duty to see that the note is provided for, he is not entitled to notice.

¹⁵Subdivision 3, same sections of negotiable instruments laws as last above cited.

Reid v. Morrison, 2 Watts & S. (Pa.) 401.

¹⁶*Mercantile Bank v. Busby* (Tenn.) 113 S. W. 390; *French v. Bank of Columbia*, 4 Cranch, 141; *Perry v. Friend*, 57 Ark. 437, 21 S. W. 1065; *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171; *Sawyer v. Brownell*, 13 R. I. 141, where the note was payable on demand, with interest. An accommodation indorser of a draft is entitled to notice of dishonor where, prior to his indorsement, the draft had been altered by changing the name of the payee, and raising the amount. *Susquehanna Val. Bank v. Loomis*, 85 N. Y. 207, 39 Am. Rep. 652.

given.¹⁷ The object of requiring the notice to come from the holder is to enable him, as the person chiefly interested, to fix or waive the liabilities of the indorsers.¹⁸ As a general rule, notice cannot be given by a total stranger,¹⁹ though it may be given by a notary²⁰ or his clerk.²¹ Except where he is acting as the agent for a holder, the maker cannot give a valid notice of protest to an accommodation indorser.²² Notice is essential; mere knowledge by the indorser of nonpayment is not sufficient.²³

May be given by agent.

Notice of dishonor may be given by an agent, either in his own, or in the name of any party entitled to give notice, whether that party be his principal or not.²⁴ One who takes a note for

¹⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 90); Ariz. (§ 3393); Ill. (§ 89); Kan. (§ 97); Md. (§ 109); Mich. (§ 92); Neb. (§ 89); N. Y. (§ 161); Ohio (§ 3174h); R. I. (§ 98); Wis. (§ 1678-20).

Cromer v. Platt, 37 Mich. 132, 26 Am. Rep. 503; Stanton v. Blossom, 14 Mass. 116; Stafford v. Yates, 18 Johns. (N. Y.) 327; Marshall v. Sonneman, 216 Pa. 65, 64 Atl. 874.

¹⁸Harris v. Robinson, 45 U. S. (4 How.) 336, 11 Law. Ed. 133.

¹⁹Lawrance v. Miller, 16 N. Y. 235; Chanoine v. Fowler, 3 Wend. (N. Y.) 173; Brower v. Wooten, 4 N. C. 507.

²⁰Burbank v. Beach, 15 Barb. (N. Y.) 326; Renick v. Robbins, 28 Mo. 339. But in giving such notice, a notary does not act in his official capacity, but merely as an agent. Bank of Linsborg v. Ober, 31 Kan. 559, 3 Pac. 324; Swayze v. Britton, 17 Kan. 625.

²¹Munroe v. Woodruff, 17 Md. 159; Cowperthwaite v. Sheffield, 3 N. Y. Super. Ct. 416.

²²Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768.

²³Marshall v. Sonneman, 216 Pa. 65, 64 Atl. 874.

²⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 91); Ariz. (§ 3394); Ill. (§ 90); Kan. (§ 98); Md. (§ 110); Mich. (§ 93); Neb. (§ 90); N. Y. (§ 162); Ohio (§ 3174j); R. I. (§ 99); Wis. (§ 1678-21).

Notice by notary as agent, see *supra*, note 20. Notice may be given in agent's name. Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773. Cashier of bank which is the holder may give notice. Bank of State of Missouri v. Vaughan, 36 Mo. 90.

collection is an agent for the purpose of giving notice,²⁵ and the owner of a note who has placed it with another for collection is not obligated either to himself notify the indorser of dishonor of the note or to make inquiries as to where the indorser received his mail.²⁶ If the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties thereon, or he may give notice to his principal.²⁷

§ 218. Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§ 219. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.²⁸

²⁵Mead v. Engs, 5 Cow. (N. Y.) 303; Burnham v. Webster, 19 Me. 232; Blakeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105. Bank holding for collection may give notice of dishonor. Manchester Bank v. Fellows, 28 N. H. 302; Mead v. Engs, 5 Cow. (N. Y.) 303; Sheldon v. Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271.

²⁶Vogel v. Starr, 132 Mo. App. 430, 112 S. W. 27.

²⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 94); Ariz. (§ 3397); Ill. (§ 93); Kan. (§ 101); Md. (§ 113); Mich. (§ 96); Neb. (§ 93); N. Y. (§ 165); Ohio (§ 3174e); R. I. (§ 102); Wis. (§ 1678-24).

Bank of United States v. Goddard, 5 Mason, 366, Fed. Cas. No. 917; Foster v. McDonald, 3 Ala. 34; First Nat. Bank v. Smith, 132 Mass. 227; Bank of United States v. Davis, 2 Hill (N. Y.) 451; Hill v. Planters' Bank, 21 Tenn. (2 Humph.) 670.

²⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 92); Ariz. (§ 3395); Ill. (§ 91);

Where notice is given by or on behalf of a party entitled to give notice, it inures to the benefit of the holder and all parties subsequent to the party to whom notice is given.²⁹

TO WHOM GIVEN.

- § 220. Notice of dishonor may be given either to the party himself or to his agent in that behalf.
- § 221. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.
- § 222. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.
- § 223. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.
- § 224. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustees or assignee.

Kan. (§ 99); Md. (§ 111); Mich. (§ 94); Neb. (§ 91); N. Y. (§ 163); Ohio (§ 3174j); R. I. (§ 100); Wis. (§ 1678-22).

Marr v. Johnson, 17 Tenn. (9 Yerg.) 1.

²⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 93); Ariz. (§ 3396); Ill. (§ 92); Kan. (§ 100); Md. (§ 112); Mich. (§ 95); Neb. (§ 92); N. Y. (§ 164); Ohio (§ 3174k); R. I. (§ 101); Wis. (§ 1678-23).

Union Bank v. Grimshaw, 8 La. 205; Brailsford v. Williams, 15 Md. 150, 74 Am. Dec. 559; Linn v. Horton, 17 Wis. 151.

To whom notice given—Party or agent.

Notice of dishonor may be given either to the party himself or to his agent in that behalf.³⁰

Same—Personal representative of deceased party.

When any party to be notified is dead, and his death is known to the party giving notice, the notice must be given to a personal representative of the deceased, if there be one, and if, with reasonable diligence, he can be found.³¹ If there is no personal rep-

³⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 97); Ariz. (§ 3400); Ill. (§ 96); Kan. (§ 104); Md. (§ 116); Mich. (§ 99); Neb. (§ 96); N. Y. (§ 168); Ohio (§ 3174-o); R. I. (§ 105); Wis. (§ 1678-27).

Fassin v. Hubbard, 55 N. Y. 465, where it was held that service on the liquidating agent of a firm was good. Death of the principal revoking agency, see note 31, *infra*.

³¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 98); Ariz. (§ 3401); Ill. (§ 97); Kan. (§ 105); Md. (§ 117); Mich. (§ 100); Neb. (§ 97); N. Y. (§ 169); Ohio (§ 3174p); R. I. (§ 106); Wis. (§ 1678-28).

Dodson v. Taylor, 56 N. J. Law, 11, 28 Atl. 316; Merchants' Bank v. Birch, 17 Johns. (N. Y.) 25, 8 Am. Dec. 367; Cayuga County Bank v. Bennett, 5 Hill (N. Y.) 236, where the holder, knowing the indorser to be dead, sent the notice by mail directed to the deceased. An executor named in the will, but yet not approved by the court, is a "personal representative," within the rule. Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773. The agency to receive notice is revoked by the death of the principal, and notice should thereafter be given to the personal representative. Brent v. Washington Bank, 2 Cranch C. C. 517, Fed. Cas. No. 1,834; Bank of Washington v. Pierson, 2 Cranch C. C. 685, Fed. Cas. No. 953. Notice to an executor after the appointment of a special administrator is not sufficient. Goodnow v. Warren, 122 Mass. 79, 23 Am. Rep. 289. A notice sent to the "estate of" a deceased indorser at his last residence was held sufficient in Bank of Port Jervis v. Darling, 91 Hun, 236, 36 N. Y. Supp. 153, and one addressed to the "legal representative" of a deceased indorser was also held sufficient in Pillow v. Hardeman, 22 Tenn. (3 Humph.) 538, 39 Am. Dec. 195. Where an indorser died before its maturity, a notice given two days after maturity to the executor is not sufficient to bind the estate. Deininger v. Miller, 7 App. Div. 409, 40

representative, notice may be sent to the last residence or last place of business of the deceased.³²

Same—Notice to partner is notice to firm.

Where the parties to be notified are partners, notice to any one partner is notice to the firm, though the firm has been dissolved.³³

Same—Joint parties not partners must each be notified.

Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.³⁴

N. Y. Supp. 195. Notice to one of several personal representatives is good. *Beals v. Peck*, 12 Barb. (N. Y.) 245.

³²Same sections of negotiable instruments laws as last above cited.

Dodson v. Taylor, 56 N. J. Law, 11, 28 Atl. 316. Mailing notice of dishonor to indorser, known to be dead, directed to a post office where he did not receive his mail while living, is insufficient. *Merchants' Bank of Canada v. Brown*, 86 App. Div. 599, 83 N. Y. Supp. 1037.

³³*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 99); Ariz (§ 3402); Ill. (§ 98); Kan. (§ 106); Md. (§ 118); Mich. (§ 101); Neb. (§ 98); N. Y. (§ 170); Ohio (§ 3174q); R. I. (§ 107); Wis. (§ 1678-29).

Coster v. Thomason, 19 Ala. 717; *Magee v. Dunbar*, 5 La. 711; *Fourth Nat. Bank v. Altheimer*, 91 Mo. 190, 3 S. W. 858; *Hibbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562. Notice to a cashier of a bank who was a member of a firm, acquired in the course of the business of the bank, is notice to the firm. *Citizens' Sav. Bank v. Hays*, 96 Ky. 365, 29 S. W. 20. Notice to surviving partner is sufficient. *Dabney v. Stidger*, 12 Miss. (4 Smedes & M.) 749; *Cocke v. Bank of Tennessee*, 25 Tenn. (6 Humph.) 51.

A notarial certificate to control which no evidence is offered furnishes sufficient proof of the maker's failure to pay the note at maturity, and of notice of dishonor to a partnership indorser, even if the partnership had been dissolved, and defendant partner not informed by his former partner of the protest. *Feigenspan v. McDonnell*, 201 Mass. 341, 87 N. E. 624.

³⁴*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 100); Ariz. (§ 3403); Ill.

Same—Notice to bankrupt or insolvent.

Where a party to be notified has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to such party himself, or to his trustee or assignee.³⁵

FORM AND REQUISITES.

§ 225. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by nonacceptance or nonpayment.

(§ 99); Kan. (§ 107); Md. (§ 119); Mich. (§ 102); Neb. (§ 99); N. Y. (§ 171); Ohio (§ 3174r); R. I. (§ 108); Wis. (§ 1678-30).

Shepard v. Hawley, 1 Conn. 367, 6 Am. Dec. 244; State Bank v. Slaughter, 7 Blackf. (Ind.) 132; Peoples' Bank v. Keech, 26 Md. 521, 90 Am. Dec. 118; Willis v. Green, 5 Hill (N. Y.) 232, 40 Am. Dec. 351. In Kentucky, notice to one joint indorser is notice to all. Dodge v. Bank of Kentucky, 9 Ky. (2 A. K. Marsh) 610; Higgins v. Morrison, 34 Ky. (4 Dana) 100. Notice to one of several successive indorsers is sufficient to bind him. City Nat. Bank v. Clinton County Nat. Bank, 49 Ohio St. 351, 30 N. E. 958.

³⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 101); Ariz. (§ 3404); Ill. (§ 100); Kan. (§ 108); Md. (§ 120); Mich. (§ 103); Neb. (§ 100); N. Y. (§ 172); Ohio (§ 3174s); R. I. (§ 109); Wis. (§ 1678-31).

Notice to assignee, see Callahan v. Bank of Kentucky, 82 Ky. 231; American Nat. Bank v. Junk Bros. Lumber & Mfg. Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492. Notice to an indorser is sufficient, though he has assigned for the benefit of creditors. Donnell v. Louis County Sav. Bank, 80 Mo. 165. In Ohio, notice to an indorser's assignee for creditors was not sufficient. House v. Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813.

§ 226. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Notice of dishonor may be in writing, or merely oral,³⁶ and should be addressed to the person sought to be held.³⁷ A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication.³⁸ Mere knowledge of the facts is not equivalent to notice,³⁹ though such knowledge was acquired by the indorsers in their capacity as administrators of the estate of the drawer.⁴⁰

Sufficiency of terms and effect of misdescription.

Notice of dishonor may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by nonacceptance or nonpayment.⁴¹ A misdescription of the in-

³⁶Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 96); Ariz. (§ 3399); Ill. (§ 95); Kan. (§ 103); Md. (§ 115); Mich. (§ 98); Neb. (§ 95); N. Y. (§ 167); Ohio (§ 3174n); R. I. (§ 104); Wis. (§ 1678-26).

Pierce v. Schrader, 55 Cal. 406; First Nat. Bank v. Hatch, 78 Mo. 13; Cuyler v. Stevens, 4 Wend. (N. Y.) 566; Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664.

³⁷Marshall v. Sonneman, 216 Pa. 65, 64 Atl. 874.

³⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 95); Ariz. (§ 3398); Ill. (§ 94); Kan. (§ 102); Md. (§ 114); Mich. (§ 97); Neb. (§ 94); N. Y. (§ 166); Ohio (§ 3174m); R. I. (§ 103); Wis. (§ 1678-25).

Formerly in New York an unsigned notice was invalid. Walmsley v. Acton, 44 Barb. (N. Y.) 312. Also in Tennessee. Peoples' Nat. Bank v. Dibrell, 91 Tenn. 301, 18 S. W. 626. A printed signature is good. Sussex Bank v. Baldwin, 17 N. J. Law, 487.

³⁹Tindal v. Brown, 1 Term R. 167.

⁴⁰Juniata Bank v. Hale, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558.

⁴¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa.,

strument in the notice does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.⁴²

HOW GIVEN.

§ 227. The notice may in all cases be given by delivering it personally or through the mails.

Tenn., Utah, Va., Wash., W. Va., Wyo (§ 96); Ariz. (§ 3399); Ill. (§ 95); Kan. (§ 103); Md. (§ 115); Mich. (§ 98); Neb. (§ 95); N. Y. (§ 167); Ohio (§ 3174n); R. I. (§ 104); Wis. (§ 1678-26).

Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664; Kilgore v. Buckley, 14 Conn. 362; Spann v. Baltzell, 1 Fla. 301, 46 Am. Dec. 346; Sasscer v. Farmers' Bank, 4 Md. 409; Ross v. Planters' Bank, 24 Tenn. (5 Humph.) 335. As to the sufficiency of the recital of the date, see Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Artisans' Bank v. Backus, 36 N. Y. 100. The name of the maker or drawer must be properly given in the notice. Home Ins. Co. v. Green, 19 N. Y. 518, 75 Am. Dec. 361. But see Gill v. Palmer, 29 Conn. 54. For illegible name, see McGeorge v. Chapman, 45 N. J. Law, 395. A mistake in the recital of the time of payment of the instrument is not fatal. Gates v. Beecher, 60 N. Y. 518, 19 Am. Rep. 207; Bank of Cooperstown v. Woods, 28 N. Y. 561. Nor is a mistake in the recital of the amount payable. Bank of Alexandria v. Swann, 34 U. S. (9 Pet.) 33, 9 Law. Ed. 40; Cayuga County Bank v. Warden, 1 N. Y. 413, where a note for \$600 was described as one for \$300. A notice to an indorser of one of a series of corporate notes, numbered differently, is not defective for a failure to state the number of the note. Hodges v. Shuler, 22 N. Y. 114. The notice must show that the instrument was presented for payment or acceptance, and was dishonored. Armstrong v. Thurston, 11 Md. 148; Dole v. Gold, 5 Barb. (N. Y.) 490. For notices held sufficient in this respect, see Cook v. Litchfield, 9 N. Y. 279; Reynolds v. Appleman, 41 Md. 615; Clark v. Eldridge, 54 Mass. (13 Metc.) 96. For notices held insufficient in this respect, see Arnold v. Kinloch, 50 Barb. (N. Y.) 44; Winn v. Alden, 4 Denio (N. Y.) 163; Page v. Gilbert, 60 Me. 485. Notice containing copy of note and declaring that payment has been demanded and refused held sufficient. Zollner v. Moffitt, 222 Pa. 644, 72 Atl. 285.

⁴²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 95); Ariz. (§ 3398); Ill. (§ 94); Kan. (§ 102); Md. (§ 114); Mich. (§ 97); Neb. (§ 94); N. Y. (§ 166); Ohio (§ 3174m); R. I. (§ 103); Wis. (§ 1678-25).

§ 228. Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department.

Notice of dishonor may in all cases be given by delivering it personally, or through the mails.⁴³ Personal service being relied upon, the evidence must show either actual personal service or an ordinarily intelligent, diligent effort to make personal service upon the indorser, either at his place of business during business hours, or at his residence if he has no place of business; but if he be absent, it is not necessary to call a second time, and the notice may in that event be left with any one found in charge, or if there be no one in charge, or no one there, then the giving of the notice is deemed to be waived.⁴⁴ Personal service is not required, but constructive service will suffice where reasonable diligence is exercised to make it in the manner best adapted to convey actual notice.⁴⁵ Formerly, in most of the states that have adopted the negotiable instruments laws, notice could not be sent by mail where the parties resided in the same town or city.⁴⁶

See *Kilgore v. Bulkley*, 14 Conn. 362, and other cases cited in note 41, *supra*.

⁴³*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 96); Ariz. (§ 3399); Ill. (§ 95); Kan. (§ 103); Md. (§ 115); Mich. (§ 98); Neb. (§ 95); N. Y. (§ 167); Ohio (§ 3174n); R. I. (§ 104); Wis. (§ 1678-26).

Zollner v. Moffitt, 222 Pa. 644, 72 Atl. 285.

⁴⁴*American Exchange Nat. Bank v. American Hotel Victoria Co.*, 103 App. Div. 372, 92 N. Y. Supp. 1006.

⁴⁵*Vogel v. Starr*, 132 Mo. App. 430, 112 S. W. 27.

⁴⁶*Shepard v. Hall*, 1 Conn. 329; *Morton v. Cammack*, 11 D. C. (4 McArthur) 22; *Bell v. Hagerstown Bank*, 7 Gill (Md.) 216; *Peirce v. Pendar*, 46 Mass. (5 Metc.) 352; *Sheldon v. Benham*, 4 Hill (N. Y.) 129, 40 Am. Dec. 271; *Costin v. Rankin*, 48 N. C. (3 Jones Law) 387; *Davis v. Bank of Tennessee*, 36 Tenn. (4 Sneed) 390; *Smith v. Hill*, 6 Wis. 154. In Wisconsin, service could be made by mail if the distance was more than

Sender of notice not chargeable with miscarriage of mails.

Where notice of dishonor is properly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.⁴⁷

What constitutes deposit of notice in post office.

Notice of dishonor is deemed to have been deposited in the post office when deposited in any branch post office, or in any letter box under the control of the post office department.⁴⁸ A liberal construction of this rule renders a delivery of a duly addressed and stamped letter containing a notice to a regular letter carrier a sufficient posting of the notice.⁴⁹ But a deposit of the letter containing the notice in a private letter box is not sufficient.⁵⁰

two miles. Rev. St. 1858, c. 12, § 5. *Westfall v. Farwell*, 13 Wis. 504. But see Rev. St. § 176. In New York (Laws 1857, c. 416) and Virginia (Code, § 2858), service could be made by mail between parties residing in the same city.

⁴⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 105); Ariz. (§ 3408); Ill. (§ 104); Kan. (§ 112); Md. (§ 124); Mich. (§ 107); Neb. (§ 104); N. Y. (§ 176); Ohio (§ 3174w); R. I. (§ 113); Wis. (§ 1678-35).

Knott v. Venable, 42 Ala. 186; *Dickens v. Beal*, 35 U. S. (10 Pet.) 572, 9 Law. Ed. 246; *Mt. Vernon Bank v. Holden*, 2 R. I. 467. Notice deemed given when properly addressed and deposited in post office, though not received. *Zollner v. Moffitt*, 222 Pa. 644, 72 Atl. 285. Sending to directory address not sufficient diligence, see note 72, *infra*.

⁴⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 106); Ariz. (§ 3409); Ill. (§ 105); Kan. (§ 113); Md. (§ 125); Mich. (§ 108); Neb. (§ 105); N. Y. (§ 177); Ohio (§ 3174x); R. I. (§ 114); Wis. (§ 1678-36).

This is the rule in *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; *Greenwich Bank v. DeGroot*, 7 Hun (N. Y.) 210; *Wood v. Callaghan*, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597; *Johnson v. Brown*, 154 Mass. 105, 27 N. E. 994.

⁴⁹*Wynen v. Schavert*, 6 Daly, 558, 55 How. Pr. (N. Y.) 156; *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737.

⁵⁰*Townsend v. Auld*, 10 Misc. 343, 31 N. Y. Supp. 29.

TIME WITHIN WHICH NOTICE MUST BE GIVEN.

§ 229. Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times hereinafter specified.

Notice of dishonor may be given as soon as the instrument is dishonored,⁵¹ and must be given within the times fixed by the negotiable instruments laws,⁵² as shown in the next succeeding sections, unless the delay is excused for the causes hereinafter set forth.

§ 230. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
2. If given at his residence, it must be given before the usual hours of rest on the day following;
3. If sent by mail, it must be deposited in the post office in time to reach him in the usual course on the day following.

Where the person and the person to receive notice reside in the same place, notice of dishonor, if given at the place of business of the person to receive notice, must be given before the close

⁵¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 102); Ariz. (§ 3405); Ill. (§ 101); Kan. (§ 109); Md. (§ 121); Mich. (§ 104); Neb. (§ 101); N. Y. (§ 173); Ohio (§ 3174t); R. I. (§ 110); Wis. (§ 1678-32).

As to premature notice where days of grace are allowed, see *Guignon v. Union Trust Co.*, 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; *Thornburg v. Emmons*, 23 W. Va. 325; *Pierce v. Cate*, 66 Mass. (12 Cush.) 190, 59 Am. Dec. 176.

⁵²Same sections of negotiable instruments laws as last above cited.

of business hours on the day following dishonor.⁵³ If given at his residence, it must be given before the usual hours of rest on the day following dishonor.⁵⁴ The negotiable instruments laws as adopted in Rhode Island provides that, in such case, notice must be given before ten o'clock in the evening of the day following dishonor.⁵⁵ If sent by mail, the notice must be deposited in the post office in time to reach the person to be notified, in the usual course, on the day following dishonor.⁵⁶

§ 231. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

- 1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter;**
- 2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision.**

Where the person giving, and the person to receive, notice of dishonor, reside in different places, the notice, if sent by mail,

⁵³Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 103); Ariz. (§ 3406); Ill. (§ 102); Kan. (§ 110); Md. (§ 122); Mich. (§ 105); Neb. (§ 102); N. Y. (§ 174); Ohio (§ 3174v); R. I. (§ 111); Wis. (§ 1678-33).

Adams v. Wright, 14 Wis. 408; Citizens' Bank v. First Nat. Bank, 135 Iowa, 605, 113 N. W. 481.

⁵⁴Subdivision 2, same sections of negotiable instruments laws as last above cited.

See *Hallowell v. Curry*, 41 Pa. 322. Formerly, in Wisconsin, at a "reasonable hour." *Adams v. Wright*, 14 Wis. 408.

⁵⁵Negotiable Inst. Law, § 111.

⁵⁶Subdivision 3, same sections of negotiable instruments laws as last above cited.

must be deposited in the post office in time to go by mail the day following the day of dishonor, or, if there be no mail, at a convenient hour on that day, by the next mail thereafter.⁵⁷ When given otherwise than through the post office, notice must be given within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last preceding paragraph.⁵⁸

§ 232. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

A party receiving notice of dishonor, he has, after receipt thereof, the same time for giving notice to antecedent parties that the holder has after dishonor.⁵⁹

Walters v. Brown, 15 Md. 285, 74 Am. Dec. 566; Shoemaker v. Mechanics Bank, 59 Pa. 79, 98 Am. Dec. 315. What constitutes deposit in post office, see ante, § 228.

⁵⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 104); Ariz. (§ 3407); Ill. (§ 103); Kan. (§ 111); Md. (§ 123); Mich. (§ 106); Neb. (§ 103); N. Y. (§ 175); Ohio (§ 3174v); R. I. (§ 112); Wis. (§ 1678-34).

Smith v. Poillon, 87 N. Y. 590, 41 Am. Rep. 402, afg. 23 Hun (N. Y.) 528; Sussex Bank v. Baldwin, 17 N. J. Law, 487; Lenox v. Roberts, 15 U. S. (2 Wheat.) 373, 4 Law. Ed. 264; Lawson v. Farmers' Bank of Salem, 1 Ohio St. 206; First Nat. Bank v. Miller, 139 Wis. 126, 120 N. W. 820.

⁵⁸Subdivision 2, same sections of negotiable instruments laws as last above cited.

⁵⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 107); Ariz. (§ 3410); Ill. (§ 106); Kan. (§ 114); Md. (§ 126); Mich. (§ 109); Neb. (§ 106); N. Y. (§ 178); Ohio (§ 3174y); R. I. (§ 115); Wis. (§ 1678-37).

See Jurgens v. Wichmann, 124 App. Div. 531, 108 N. Y. Supp. 881; Farmer v. Rand, 16 Me. 453; National Bank v. Bradley, 117 N. C. 526, 23 S. E. 455; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, 3 Am. Rep. 445. See, also, First Nat. Bank v. Farneman, 93 Iowa, 161, 61 N. W. 424. For effect of intermediate agency for collection, on time required for notice to successive obligors, see Slack v. Longshaw, 8 Ky. Law Rep.

- § 233. Where the instrument has been dishonored in the hands of an agent, and, if he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

The instrument being dishonored in the hands of an agent, if the latter gives notice to his principal he must do so within the time required if he were the holder, and the principal, on receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.⁶⁰ This provision is identical with the provisions of the English Bills of Exchange Act, under which it has been held that where one branch of a country bank sent a customer's bill to a London bank for presentment, and, on the day after dishonor, the London bank sent notice by post to a branch of the country bank other than the branch from which it received the bill, but on the next day, on discovering the mistake, telegraphed notice to such branch, the notice was sufficient to bind an indorser.⁶¹

PLACE WHERE NOTICE MUST BE SENT.

- § 234. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

166; *Warren v. Gillman*, 17 Me. 360; *McNeil v. Wyatt*, 22 Tenn. (3 Humph.) 125.

⁶⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 94); Ariz. (§ 3397); Ill. (§ 93); Kan. (§ 101); Md. (§ 113); Mich. (§ 96); Neb. (§ 93); N. Y. (§ 165); Ohio (§ 3174-1); R. I. (§ 102); Wis. (§ 1678-24).

⁶¹Act 1882 (45 & 46 Vict. c. 61, § 49, subd. 13). *Fielding & Co. v. Corry* [1898] 1 Q. B. 268.

1. **Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or**
2. **If he live in one place, and have his place of business in another, notice may be sent to either place; or**
3. **If he is sojourning in another place, notice may be sent to the place where he is sojourning.**

§ 235. **But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.**

Where a party has added an address to his signature, notice of dishonor must be sent to that address;⁶² but if he has not given such address, then notice must be sent either to the post office nearest to his place of residence, or to the one where he is accustomed to receive his letters.⁶³ When the indorser lives in the

⁶²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 108); Ariz. (§ 3411); Ill. (§ 107); Kan. (§ 115); Md. (§ 127); Mich. (§ 110); Neb. (§ 107); N. Y. (§ 179); Ohio (§ 3174z); R. I. (§ 116); Wis. (§ 1678-38).

Farmers' & Merchants' Bank v. Battle, 23 Tenn. (4 Humph.) 86. But see *Davenport v. Gilbert*, 17 N. Y. Super. Ct. (4 Bosw.) 532, 19 N. Y. Super. Ct. (6 Bosw.) 179, and *Bartlett v. Robinson*, 39 N. Y. 187, where addressing a letter generally to the indorser in the "City of New York" was not sufficient, the address under the signature of the indorser having been more definite.

⁶³Same subdivision and sections of negotiable instruments laws as last above cited.

Jones v. Lewis, 8 Watts & S. (Pa.) 14; *Mohlman v. McKane*, 60 App. Div. 546, 69 N. Y. Supp. 1046. Service of notice of dishonor is not shown by the mere testimony of the notary that, not knowing the address of the indorser, he enclosed the notice of dishonor to a subsequent indorser with postage for forwarding the same to the prior indorser, the latter testifying that he never received it. *Fuller Buggy Co. v. Waldron*, 112 App. Div. 814, 99 N. Y. Supp. 561. Knowing city where indorser resided held insufficient to send notice addressed to indorser care of maker. *E.*

country and his post office address is not known to the holder, it is the duty of the latter to make reasonable inquiries in the town or city where the bill is payable, and, in default of more specific information, to address the notice to the nearest post office.⁶⁴ But the holder is not justified, in all cases, in sending the notice to the nearest post office. He must act in good faith always and with reasonable diligence to learn the place where the indorser receives his mail, and, learning it, must send the notice there, regardless of whether it be the nearest post office.⁶⁵

If the person to be notified live in one place, and have his place of business in another, notice may be sent to either.⁶⁶ If such person is staying, or, as the negotiable instruments laws express it, is "sojourning," in a place other than his customary place of residence or business, the notice may be sent to such place.⁶⁷ But the stability of residence required under the law relating to taxation and the settlement of paupers is not necessary when ascertaining the abode of an indorser for the purpose of giving notice to him by mail of the dishonor of commercial paper.⁶⁸

Actual receipt is sufficient.^{68a}

I. Dupont de Nemour Powder Co. v. Rooney, 63 Misc. 344, 117 N. Y. Supp. 220.

⁶⁴Vogel v. Starr, 132 Mo. App. 430, 112 S. W. 27.

⁶⁵Vogel v. Starr, 132 Mo. App. 430, 112 S. W. 27. Where notary made inquiries of several persons, etc., and sent notice to wrong town, held notice was sufficient. *Id.*

⁶⁶Subdivision 2, same sections of negotiable instruments laws as last above cited.

Bank of Columbia v. Lawrence, 26 U. S. (1 Pet.) 578, 7 Law. Ed. 707; Simms v. Larkin, 19 Wis. 390; Phillips v. Alderson, 24 Tenn. (5 Humph.) 403.

⁶⁷Subdivision 3, same sections of negotiable instruments laws as last above cited.

Williams v. Bank of United States, 27 U. S. (2 Pet.) 96, 7 Law. Ed. 30. But see Wachusett Nat. Bank v. Fairbrother, 148 Mass. 181, 19 N. E. 345, 12 Am. St. Rep. 530.

⁶⁸Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363.

^{68a}Same section negotiable instruments laws as last above cited.

DISPENSING WITH, WAIVER OF AND EXCUSES FOR DELAY IN GIVING
NOTICE.

§ 236. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

§ 237. Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary, unless in the meantime the instrument has been accepted.

As the general rule of the law merchant and of the negotiable instruments act requires notice, the failure to give notice is dispensed with only in the cases enumerated therein,⁶⁹ and the burden is on the party claiming under the negotiable instrument to excuse the failure to give notice within the provisions of this section.⁷⁰ Notice of dishonor may be dispensed with when, after the exercise of reasonable diligence, it cannot be given to, or does not reach, the parties sought to be charged.⁷¹ What constitutes "reasonable diligence" is a question to be decided on the facts of each case.⁷² But there being no controversy over the material facts, the question whether a notary exercised reasonable dili-

⁶⁹Cassell v. Regierer, 114 N. Y. Supp. 601.

⁷⁰Cassell v. Regierer, 114 N. Y. Supp. 601. The mere fact of dishonor is not of itself sufficient to dispense with the requirement of notice: *Id.*

⁷¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 112); Ariz. (§ 3415); Ill. (§ 111); Kan. (§ 119); Md. (§ 131); Mich. (§ 114); Neb. (§ 111); N. Y. (§ 183); Ohio (§ 3175c); R. I. (§ 120); Wis. (§ 1678-42).

⁷²On the question of reasonable diligence, see *Gawtry v. Doane*, 51 N. Y. 84; *Bank of Utica v. Bender*, 21 Wend. (N. Y.) 643, 34 Am. Dec. 281; *Shepard v. Citizens' Ins. Co.*, 8 Mo. 272. Looking for name in city directory, without other inquiry, is not reasonable diligence. *Cumming v. Roderick*, 28 App. Div. 253, 51 N. Y. Supp. 1053; *Bacon v. Hanna*, 137 N. Y. 379, 33 N. E. 303, 20 L. R. A. 495, affg. 17 N. Y. Supp. 430; *Lawrence v. Miller*, 16 N. Y. 235; *Baer v. Leppert*, 12 Hun (N. Y.) 516. A state of war excuses notice if sufficient to prevent the conduct

gence in giving a notice of dishonor to an indorser is a question of law.⁷³ The fact that the principal obligor is dead does not relieve the holder from the duty to give notice to the indorser.⁷⁴ Notice of dishonor by nonpayment is also dispensed with where due notice of a prior dishonor by nonacceptance has been given, unless in the meantime the instrument has been accepted.⁷⁵

§ 238. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

§ 239. A waiver of protest is deemed to be a waiver of notice of dishonor.

§ 240. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

Notice of dishonor may be waived⁷⁶ either before the time for giving notice has arrived, or after the omission to give due no-

of business through the mails. *Morgan v. Bank of Louisville*, 67 Ky. (4 Bush) 82; *House v. Adams*, 48 Pa., 261, 86 Am. Dec. 588.

⁷³*Vogel v. Starr*, 132 Mo. App. 430, 112 S. W. 27.

⁷⁴*Reed v. Spear*, 107 App. Div. 144, 94 N. Y. Supp. 1007.

⁷⁵*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 116); Ariz. (§ 3419); Ill. (§ 115); Kan. (§ 123); Md. (§ 135); Mich. (§ 118); Neb. (§ 115); N. Y. (§ 187); Ohio (§ 3175g); R. I. (§ 124); Wis. (§ 1678-46).

⁷⁶*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 109); Ariz. (§ 3412); Ill. (§ 108); Kan. (§ 116); Md. (§ 128); Mich. (§ 111); Neb. (§ 108); N. Y. (§ 180); Ohio (§ 3175); R. I. (§ 117); Wis. (§ 1678-39).

Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455. Expressly or impliedly. *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545.

See, also, *Robinson v. Barnett*, 19 Fla. 670, 45 Am. Rep. 24.

tice,⁷⁷ and the waiver may be express or implied,⁷⁸ for the statute has not changed the law respecting waiver,⁷⁹ and having knowledge of the facts, ignorance, in the absence of fraud, of their legal effect, as releasing him from liability, does not save him from the consequences of the waiver.⁸⁰

A promise to pay made by an indorser after dishonor, and with knowledge that he had been released by a failure to give him notice of dishonor, is a waiver of such notice.⁸¹ A waiver of protest is deemed to be a waiver of notice of dishonor.⁸²

Parties affected.

Where the waiver is embodied in the instrument, it is binding

⁷⁷Same sections of negotiable instruments laws as last above cited.

Barclay v. Weaver, 19 Pa. 396, 57 Am. Dec. 661.

⁷⁸Same sections of negotiable instruments laws as last above cited.

Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886. Indorser giving check for dishonored note held to waive failure to give notice. Weil v. Corn Exchange Bank, 63 Misc. 300, 116 N. Y. Supp. 665.

An express waiver may be by parol. Porter v. Kemball, 53 Barb. (N. Y.) 467; Worden v. Mitchell, 7 Wis. 161. For cases on implied waiver, see Markland v. McDaniel, 51 Kan. 350, 32 Pac. 1114, 20 L. R. A. 96; Seiger v. Second Nat. Bank, 132 Pa. 307, 19 Atl. 217. Implied waiver where indorser was president of corporation and participated in having latter adjudged a bankrupt. W. O'Bannon Co. v. Curran, 113 N. Y. Supp. 359. Taking security or indemnity sufficient to cover liability as implied waiver, see Brandt v. Mickle, 28 Md. 436; Durham v. Price, 13 Tenn. (5 Yerg.) 300, 26 Am. Dec. 267; Secord v. Miller, 13 N. Y. 55; Whittier v. Collins, 15 R. I. 44, 23 Atl. 39; Denny v. Palmer, 27 N. C. (5 Ired.) 610; Wilson v. Senier, 14 Wis. 380; Armstrong v. Chadwick, 127 Mass. 156.

⁷⁹First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445.

⁸⁰Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455.

⁸¹Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365.

⁸²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 111); Ariz. (§ 3414); Ill. (§ 110); Kan. (§ 118); Md. (§ 130); Mich. (§ 113); Neb. (§ 110); N. Y. (§ 182); Ohio (§ 3175b); R. I. (§ 119); Wis. (§ 1678-41).

Bank of Montpelier v. Montpelier Lumber Co. (Idaho) 102 Pac. 685.

on all parties;⁸³ but where it is written above the signature of an indorser, it binds him only.⁸⁴

§ 241. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Delay in giving notice of dishonor is excused when caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence.⁸⁵ When the cause of delay ceases to operate, notice must be given with reasonable diligence.⁸⁶

⁸³Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 110); Ariz. (§ 3413); Ill. (§ 109); Kan. (§ 117); Md. (§ 129); Mich. (§ 1121); Neb. (§ 109); N. Y. (§ 181); Ohio (§ 3175a); R. I. (§ 118); Wis. (§ 1678-40).

Iowa Val. State Bank v. Sigstad, 96 Iowa, 491, 65 N. W. 407; Bryant v. Merchants' Bank, 71 Ky. (8 Bush) 43.

⁸⁴Same sections of negotiable instruments laws as last above cited.

Central Bank v. Davis, 36 Mass. (19 Pick.) 373. But, contra, see Parshley v. Heath, 69 Me. 90, 31 Am. Rep 246. A waiver printed on the back of the instrument binds the payee indorsing on another part of the instrument. Farmers' Bank v. Ewing, 78 Ky. 264, 39 Am. Rep. 231.

⁸⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 113); Ariz. (§ 3416); Ill. (§ 112); Kan. (§ 120); Md. (§ 132); Mich. (§ 115); Neb. (§ 112); N. Y. (§ 184); Ohio (§ 3175o); R. I. (§ 121); Wis. (§ 1678-43).

An ambiguous signature by an indorser, causing notice to be improperly addressed, is an excuse for a delay of several days. Manufacturers' & Traders' Bank v. Hazard, 30 N. Y. 226. Existence of malignant disease is an excuse for delay. Hanauer v. Anderson, 84 Tenn. (16 Lea) 340; Tunno v. Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 14. War is also an excuse. See cases cited in note 72, *infra*.

⁸⁶Same sections of negotiable instruments laws as last above cited.

Harden v. Boyce, 59 Barb. (N. Y.) 425; Farmers' Bank of Virginia v. Gummell, 26 Grat. (Va.) 131; Bank of Old Dominion v. McVeigh, 29 Grat. (Va.) 546.

EFFECT OF OMISSION TO GIVE NOTICE.

§ 242. An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission.

An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission.⁸⁷ The Wisconsin negotiable instruments law adds to this rule a proviso that it shall not be construed to revive any liability discharged by such omission.⁸⁸

⁸⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 117); Ariz. (§ 3420); Ill. (§ 116); Kan. (§ 124); Md. (§ 136); Mich. (§ 119); Neb. (§ 116); N. Y. (§ 188); Ohio (§ 3175h); R. I. (§ 125); Wis. (§ 1678-47).

⁸⁸Negotiable Inst. Law, § 1678-47.

CHAPTER XV.

FORGERY AND ALTERATION.

- § 243. Forged or Unauthorized Signature.
- § 244. Effect of Alteration.
- § 245. Bona Fide Holders.
- § 246. What Alterations Are Material.
- § 247. Same.
- § 248. Presumptions and Burden of Proof.

FORGED OR UNAUTHORIZED SIGNATURE.

- § 243. Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof, against any party thereto, can be acquired through or under such signature, unless the party against whom enforcement is sought is precluded from setting up the forgery or want of authority.¹ It is the forged or unauthorized signature that is declared to be inoperative, and the in-

¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 23); Ariz. (§ 3326); Ill. (§ 23); Kan. (§ 30); Md. (§ 42); Mich. (§ 25); Neb. (§ 23); N. Y. (§ 42); Ohio (§ 3171v); R. I. (§ 31); Wis. (§ 1675-23).

hibitory clause forbids recovery on the instrument as against any party where the right of recovery is predicated on such inoperative signature. Stated in another way, the forged or unauthorized signature cannot be made the basis of any right against any party to the instrument on which such signature appears.² The fact that signatures to notes are forged does not preclude an action on the indorsements and guaranties of the notes, the statutory provision being inaplicable as the actions are not brought on the notes.³ That no rights can be acquired by a bona fide or other holder, under a forged signature as against the person whose name is forged, in the absence of an estoppel or of an adoption of the signature, is a settled rule of law.⁴ If the payee named in a check is a fictitious person, the indorsement of such name thereon by the person cashing the same is a forgery.⁵ An indorsement made by one falsely representing himself to be the payee transfers no title, though paper was delivered to him by maker under the impression that he was in reality the party named as payee,⁶ but this would not be true, especially against a bona fide holder, if such person, though falsely representing his identity, is the person for whom the instrument was in fact in-

²Been v. Farrell, 135 Iowa, 670, 113 N. W. 509. A bank which has collected a draft from the drawee upon which the payee's indorsement is forged cannot retain the money as it had no title to the draft. Seaboard Nat. Bank v. Bank of America, 193 N. Y. 26, 85 N. E. 829, afg 51 Misc. 103, 100 N. Y. Supp. 740, and 118 App. Div. 907, 103 N. Y. Supp. 1141.

³State v. Corning State Sav. Bank, 139 Iowa, 338, 115 N. W. 937.

⁴Mersman v. Werges, 3 Fed. 378; Miers v. Coates, 57 Ill. App. 216; Butler v. Carns, 37 Wis. 61. See, also, Booth v. Powers, 56 N. Y. 22; Camp v. Carpenter, 52 Mich. 375, 18 N. W. 113. A person whose name was forged as an indorser is not liable as such to a bona fide holder. Citizens' State Bank v. Adams, 91 Ind. 280; Rowe v. Putnam, 131 Mass. 281; Roach v. Woodall, 91 Tenn. 206, 18 S. W. 407, 30 Am. St. Rep. 883; Terry v. Allis, 16 Wis. 478, 504, 20 Wis. 32, 35.

⁵Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 15 Det. Leg. N. 376, 116 N. W. 617, 126 Am. St. Rep. 467, 17 L. R. A. (N. S.) 514.

⁶Tolman v. American Nat. Bank, 22 R. I. 462, 48 Atl. 480, 84 Am. St. Rep. 850, 55 L. R. A. 877.

⁷Jamieson & McFarland v. Heim, 43 Wash. 153, 86 Pac. 165.

tended.⁷ The unauthorized diversion, by an agent, of checks after indorsement, does not make such indorsement a forgery.⁸

Logically, a forged signature is not capable of ratification, but may be adopted by the person whose name was used. The word "ratification" is used, however, in the decisions, and it has been held that a ratification may take place, though there was no agency or facts creating an estoppel in pais,⁹ and no new consideration.¹⁰ Ratification or adoption of the signature may take place where the proceeds of the instrument are used with knowledge of the forgery,¹¹ or where the person whose name was forged accepts a conveyance or deed of trust as security or indemnity;¹² but mere silence is not sufficient.¹³

One who signs as surety below the signature of other ostensible sureties cannot show as against a bona fide holder that the prior signatures were forged;¹⁴ nor can one who negotiates an instrument by delivery or by qualified indorsement set up forgery against his immediate transferee, for, by thus negotiating it, he warrants that it is genuine;¹⁵ nor can an acceptor set up forgery

⁸*Salem v. Bank of State of New York*, 110 App. Div. 636, 97 N. Y. Supp. 361.

⁹*Greenfield Bank v. Crafts*, 86 Mass. (4 Allen) 447; *Wellington v. Jackson*, 121 Mass. 157. A ratification of a forged signature is binding. *Central Nat. Bank v. Copp*, 184 Mass. 328, 68 N. E. 334.

¹⁰*Howard v. Duncan*, 3 Lans. (N. Y.) 174. But see criticism of holding in *Hood v. Nichols*, 3 Alb. Law J. 331, 1 Wkly. Law Bul. 227, and *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546, in which it was held that a forged note is void ab initio and incapable of ratification.

¹¹*Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

¹²*Fitzpatrick v. School Com'rs*, 26 Tenn. (7 Humph.) 224, 46 Am. Dec. 76; *Jones v. Hamlet*, 34 Tenn. (2 Sneed) 256; *Bell v. Waudby*, 4 Wash. 743.

¹³*California Bank v. Sayre*, 85 Cal. 102, 24 Pac. 713; *DeLand v. Dixon Nat. Bank*, 111 Ill. 323. Especially where the party sought to be charged did not know of the unauthorized use of his name until after maturity of the instrument. *Walters v. Munroe*, 17 Md. 150. And see *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 45 N. E. 923, 57 Am. St. Rep. 458, 36 L. R. A. 539.

¹⁴*Selser v. Brock*, 3 Ohio St. 303.

¹⁵*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 65); *Ariz.* (§ 3368); *Ill.* (§ 65);

because, by his acceptance, he admits the existence of the drawer and the genuineness of his signature.¹⁶ An estoppel may be created by negligence,¹⁷ or by admitting that the signature is genuine,¹⁸ or by such admission, coupled with a promise to pay, whereby the holder is induced to abandon his remedy against other parties,¹⁹ or by a representation to a prospective purchaser that he may safely buy the instrument.²⁰

EFFECT OF ALTERATIONS.

§ 244. Where a negotiable instrument is materially altered without the assent of all parties liable thereto, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized, or consented to the

Kan. (§ 72); Md. (§ 84); Mich. (§ 67); Neb. (§ 65); N. Y. (§ 115); Ohio (§ 3173j); R. I. (§ 73); Wis. (§ 1674-5).

Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171. And see *Coolidge v. Brigham*, 46 Mass. (5 Metc.) 68.

¹⁶*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 62); Ariz. (§ 3365); Ill. (§ 62); Kan. (§ 69); Md. (§ 81); Mich. (§ 64); Neb. (§ 62); N. Y. (§ 112); Ohio (§ 3173g); R. I. (§ 70); Wis. (§ 1677-2).

United States Bank v. Bank of Georgia, 23 U. S. (10 Wheat.) 333, 6 Law. Ed. 423; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305.

¹⁷*Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 29 Law. Ed. 811. See, also, *Woodruff v. Munroe*, 33 Md. 146; *Wilson v. Law*, 112 N. Y. 536, 20 N. E. 399. But an innocent transferee is not chargeable with the negligence of his transferrer in failing to make proper inquiry. *First Nat. Bank of Marshalltown v. Marshalltown State Bank*, 107 Iowa, 327, 77 N. W. 1045, 44 L. R. A. 131.

¹⁸*Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106.

¹⁹*Hefner v. Dawson*, 63 Ill. 403, 14 Am. Rep. 123.

²⁰*Crout v. De Wolf*, 1 R. I. 393.

alteration, and subsequent indorsers.²¹ It would seem that this authority may be implied.²² The consent may be by an agent.²³ While, as between the parties, the authority implied of law to fill in blanks does not authorize material alterations in the original terms of the notes,²⁴ still, the section under consideration purports to lay down a general rule as to the alteration of instruments. It does not purport to cover a case where a blank has been negligently left or only partly filled and the instrument changed by filling in the blank.²⁵ In such case the party negligently so making or negotiating the instrument is liable to an innocent holder.²⁶ According to the weight of authority in this country, a material alteration by a stranger, or a spoilation of it, as it is termed, will not avoid the note. The contrary has, however, been adopted in England,²⁷ and will likely be adhered to under the Bills of Exchange Act.²⁸ Whether, therefore, this section which is copied from the English act²⁹ should receive the same construction as that placed upon it, or likely to be placed upon it, in England, is a matter for serious consideration. In this connection it would seem not unreasonable to suppose that it was the intention of the framers of the American act that it

²¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 124); Ariz. (§ 3427); Ill. (§ 123); Kan. (§ 131); Md. (§ 143); Mich. (§ 126); Neb. (§ 123); N. Y. (§ 205); Ohio (§ 3175o); R. I. (§ 132); Wis. (§ 1679-5).

See *Taddiken v. Cantrell*, 69 N. Y. 597, 25 Am. Rep. 253; *Stewart v. First Nat. Bank*, 40 Mich. 348.

²²*First Nat. Bank of Wilkes-Barre v. Barnum*, 160 Fed. 245.

²³*Luckenbach v. McDonald*, 164 Fed. 296.

²⁴Where one indorsed printed form of a note in which the date, amount, and time of payment were all blank, held the maker was not authorized to change face as printed on form. *First Nat. Bank of Wilkes-Barre v. Barnum*, 160 Fed. 245.

²⁵*National Exchange Bank v. Lester*, 119 App. Div. 786, 104 N. Y. Supp. 418; *Johnston v. Hoover*, 139 Iowa, 143, 117 N. W. 277.

²⁶Raised check. *National Exchange Bank v. Lester*, 119 App. Div. 786, 104 N. Y. Supp. 418.

²⁷*Davidson v. Cooper*, 11 Mees & W. 778, 13 Mees & W. 343.

²⁸*Chalmers' Bills of Exchange* (5th Ed.) 213, 214.

²⁹*Bills of Exchange Act*, § 64, St. 45 & 46 Vict. c. 61.

should be construed according to the law of this country rather than that of England.³⁰ It is no defense to material alterations in printed portions of a note to say that they are in the handwriting of the maker, the same as the rest of the written parts, dispelling suspicion and thereby doing away with the necessity of inquiry.³¹

RIGHTS OF BONA FIDE HOLDERS.

§ 245. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Where an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.³² This provision of the negotiable instruments laws changes the

³⁰Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 49. In Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 49, the following language is used: "We should hesitate to say that the effect of § 124 is not only to avoid the note in case of a material alteration, but to cancel the date for which it was given, and to deprive a party of the benefit of any security that he may have taken." Enforced against indorser according to original tenor; maker made alteration in note at request of payee after indorsement; plaintiff a subsequent holder. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. Supp. 810.

³¹First Nat. Bank of Wilkes-Barre v. Barnum, 160 Fed. 245.

³²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 124); Ariz. (§ 3427); Ill. (§ 123); Kan. (§ 131); Md. (§ 143); Mich. (§ 126); Neb. (§ 123); N. Y. (§ 205); Ohio (§ 3175o); R. I. (§ 132); Wis. (§ 1679-5).

Thorpe v. White, 188 Mass. 333, 74 N. E. 592; Bothell v. Schweitzer (Neb.) 120 N. W. 1129.

law,³³ and is only applicable in favor of a holder in due course,³⁴ and does not apply where note had no inception,³⁵ or where the alteration is such as to make it impossible to enforce it according to its original tenor.³⁶ The question of negligence on the part of the maker is often important, and it has been held that the maker cannot defend against a bona fide holder, where he had left sufficient space to permit of an alteration without defacing the instrument.³⁷ On this point, an instructive case has been decided under the corresponding provisions of the English Bills of Exchange Act, which are identical with the provisions of the negotiable instruments law just considered in this section, and in the first paragraph of the preceding section. The action was brought by a bona fide holder against the acceptor of a bill which, when accepted, was for £500, but which, after acceptance and before indorsement, had been raised by the drawer to £3,500. It

³³See *Gettysburg Nat. Bank v. Chisholm*, 169 Pa. 564, 32 Atl. 730, 47 Am. St. Rep. 929; *Seebold v. Tatlie*, 76 Minn. 131, 78 N. W. 967; *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115. In a well considered Massachusetts case, decided before the negotiable instruments law was passed in that state, it was held that where the maker of a note, after it had been indorsed for his accommodation, raised the amount from \$500 to \$2,000, and discounted the note for the latter sum with the plaintiff bank, the indorser was discharged, and was not liable to the bank even for the original amount of the note. *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110.

³⁴*First Nat. Bank of Wilkes-Barre v. Barnum*, 160 Fed. 245.

³⁵*First Nat. Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445.

³⁶Name of one of several payees changed after only defendant payee had indorsed note. *First Nat. Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445.

³⁷*Holmes v. Bank of Ft. Gaines*, 120 Ala. 493, 24 So. 959; *Weidman v. Symes*, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603; *Garrard v. Haddan*, 67 Pa. 83, 5 Am. Rep. 412; *Visher v. Webster*, 13 Cal. 58; *Scotland County Bank v. O'Connel*, 23 Mo. App. 165; *Burch v. Daniel*, 101 Ga. 228, 28 S. E. 622. In a recent case where the amount of the note was increased, it was held that an accommodation indorser was not liable for the increased amount to a bona fide holder, though spaces on the note rendered the alteration easy, the note being complete at the time of the indorsement. *National Exchange Bank v. Lester*, 194 N. Y. 461, 87 N. E. 779, 119 App. Div. 786, 104 N. Y. Supp. 418.

appeared that at the time of acceptance the figures 500, preceded by the sign “£,” were in the left hand corner of the bill, but that there was space enough between the sign and the figures for the insertion of another figure, and that in the body of the bill there was sufficient blank space before the written words “five hundred pounds” for the insertion of the words “three thousand,” and that there was a stamp on the bill larger than was necessary for a 500-pound bill. The court held that the acceptor was not negligent, as he was not bound to anticipate that the bill would fall into the hands of a felonious person, who might fill the spaces, and that, presupposing negligence on the part of the acceptor, no estoppel arose as against him because the felonious act of the forger intervened between such negligence and the indorsement to the holder.³⁸ It is gross negligence to sign an instrument having an important clause affecting the signer’s liability written in pencil, and, in case the clause is erased, it has been held that a bona fide holder may recover on the instrument as it was when he received it.³⁹ Under the negotiable instruments laws, the holder in this case would be permitted to recover only according to the original tenor of the instrument. An alteration by detaching a part of the instrument which had been so executed that it could be detached without injury to the remainder of the instrument is no defense against a bona fide holder.⁴⁰

WHAT ALTERATIONS ARE MATERIAL.

§ 246. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;

³⁸45 & 46 Vict. c. 61, § 64. *Scholfield v. Earl of Londesborough* [1895] 1 Q. B. 536. See, also, *Blakey v. Johnson*, 76 Ky. (13 Bush) 197, 26 Am. Rep. 254.

³⁹*Harvey v. Smith*, 55 Ill. 224.

⁴⁰*Elliott v. Levings*, 54 Ill. 213; *Woolen v. Ulrich*, 64 Ind. 120; *Zimmerman v. Rote*, 75 Pa. 188; *Brown v. Reed*, 79 Pa. 370, 21 Am. Rep. 75. But see *Scofield v. Ford*, 56 Iowa, 370, citing *Benedict v. Cowden*,

3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium of currency in which payment is to be made.

§ 247. Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Any alteration is material which changes the date,⁴¹ the sum payable either for principal or interest,⁴² the time or place of payment,⁴³ the number or relation of the parties,⁴⁴ and the medium

49 N. Y. 396, 10 Am. Rep. 382, where the authorities are collected and discussed.

⁴¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 125); Ariz. (§ 3428); Ill. (§ 124); Kan. (§ 132); Md. (§ 144); Mich. (§ 127); Neb. (§ 124); N. Y. (§ 206); Ohio (§ 3175p); R. I. (§ 133); Wis. (§ 1679-6).

McCormick Harvesting Mach. Co. v. Lauber, 7 Kan. App. 730, 52 Pac. 577; McMillan v. Hefferlin, 18 Mont. 385, 45 Pac. 548; Low v. Merrill, 1 Pin. (Wis.) 340; Wyman v. Yeomans, 84 Ill. 403; Inglish v. Breneman, 5 Ark. 377, 41 Am. Dec. 96; Britton v. Dierker, 46 Mo. 591, 2 Am. Rep. 553. An innocent change of date made by the payee, from August 11th to August 12th, though material, did not destroy "the legal efficacy of the note, and recovery may be had upon it when restored." Wallace v. Tice, 32 Or. 283, 51 Pac. 733.

⁴²Same section of negotiable instruments laws as last above cited.

National Park Bank v. Ninth Nat. Bank, 55 Barb. (N. Y.) 87; Batchelder v. White, 80 Va. 103; Wade v. Withington, 83 Mass. (1 Allen) 561; Aetna Nat. Bank v. Winchester, 43 Conn. 391; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697. Alterations as to interest, see Little Rock Trust Co. v. Martin, 57 Ark. 277, 21 S. W. 468; Hurlbut v. Hall, 39 Neb. 889, 58 N. W. 538; Lewis v. Shepherd, 12 D. C. (1 Mackey) 46; Lamar v. Brown, 56 Ala. 157; Heath v. Blake, 28 S. C. 406, 5 S. E. 842; Harsh v. Kleeper, 28 Ohio St. 200, and cases cited. Words "with interest at 8 % per annum after due until paid" added. Colonial National Bank v. Duerr, 108 App. Div. 215, 95 N. Y. Supp. 810.

⁴³Same sections negotiable instruments laws last above cited.

Time of payment, see Seebold v. Tatlie, 76 Minn. 131, 78 N. W. 967. Place of payment, see Adair v. Eglad, 58 Iowa, 314, 12 N. W. 277;

or currency in which payment is to be made,⁴⁵ or which adds a place of payment, where no place of payment is specified,⁴⁶ or makes any other change or addition which alters the effect of the instrument.⁴⁷ A memorandum or indorsement written on the back of a promissory note at the time of its expiration which limits its consideration, affects its operation, and was intended to be a part of the contract, must be regarded as a substantive part of the note.⁴⁸ How strict the courts are with regard to the question of materiality is shown by the following case: "If paid at maturity, the note, as executed, bore no interest, but, as altered, 8 per cent. per annum from the 1st of November, 1889, until the 4th of the same month. The difference is slight, but the maxim

Troy City Bank v. Louman, 19 N. Y. 477; *First Nat. Bank of Wilkes-Barre v. Barnum*, 160 Fed. 245.

⁴⁴Same sections of negotiable instruments laws as last above cited.

Change of name of payee. *Hoffman v. Planters' Nat. Bank*, 99 Va. 480, 39 S. E. 134; *Mersman v. Werges*, 112 U. S. 139, 28 Law. Ed. 641; *Chappell v. Spencer*, 23 Barb. (N. Y.) 584. The erasure of the name of the payee and the substitution of another name is a material alteration. *Erickson v. First Nat. Bank*, 44 Neb. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577. Changing the word "order" to "bearer" is a material alteration. *Belknap v. National Bank of North America*, 100 Mass. 376, 97 Am. Dec. 105; *Union Nat. Bank v. Roberts*, 45 Wis. 373. See, also, *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

⁴⁵Same sections of negotiable instruments laws as last above cited.

Church v. Howard, 17 Hun (N. Y.) 5; *Darwin v. Rippey*, 63 N. C. 318; *Wills v. Wilson*, 3 Or. 308.

⁴⁶Same sections negotiable instruments laws last cited.

Sturges v. Williams, 9 Ohio St. 443, 75 Am. Dec. 473; *Southwark Bank v. Gross*, 35 Pa. 80.

⁴⁷Same sections of negotiable instruments laws as last above cited.

The erasure of an agreement to pay costs of collection and attorney's fees is a material alteration. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473. Tracing over in ink what was previously written in pencil is not an alteration. *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127. Alteration lessening indorsements of payment held material. *Kurth v. Farmers' & Merchants' State Bank*, 77 Kan. 475, 94 Pac. 798, 127 Am. St. Rep. 428, 15 L. R. A. (N. S.) 612.

⁴⁸*Kurth v. Farmers' & Merchants' State Bank*, 77 Kan. 475, 94 Pac. 798, 127 Am. St. Rep. 428, 15 L. R. A. (N. S.) 612.

'De minimis non curat lex' does not apply to cases like this."⁴⁹ Under the general rule that an alteration, to be material, "must in some way affect the legal rights of the parties as they were expressed before the change was made," it has been held that two alterations by which a note, originally payable to a bank, and signed by two persons as makers, and two as sureties, was first changed by adding, under the signature of the makers, the signature of a third person, who had intended to sign as an indorser, and was again changed by making it payable to such third person, and simultaneously adding his indorsement to the bank, and a guaranty by him of payment of the note, are immaterial on the ground that the rights and duties of the bank and the makers were precisely the same after as before the changes.⁵⁰

PRESUMPTION AND BURDEN OF PROOF.

§ 248. By the weight of authority, an apparent alteration is presumed to have been made at or before delivery and the burden of proving a fraudulent alteration is on the party alleging it.

The decisions are not in harmony on the questions of the presumptions and burden of proof in case of the alteration of a negotiable instrument; but the weight of authority favors the rule that an apparent alteration will be presumed to have been made at or before delivery, and, consequently, to be a part of the agreement of the parties.⁵¹ Hence, the burden of proving a fraudulent alteration after delivery is on the party alleging it.⁵² Mere

⁴⁹Little Rock Trust Co. v. Martin, 57 Ark. 277, 21 S. W. 468.

⁵⁰Ryan v. First Nat. Bank of Springfield, 148 Ill. 349, 35 N. E. 1120.

⁵¹Paramore v. Lindsey, 63 Mo. 63; Stillwell v. Patton, 108 Mo. 352, 18 S. W. 1075; Corcoran v. Doll, 32 Cal. 82; Franklin v. Baker, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547. See, also, Odell v. Gallup, 62 Iowa, 253, 17 N. W. 502; Simpson v. Davis, 119 Mass. 269; Page v. Danaher, 43 Wis. 221; Byers v. Tritch, 12 Colo. App. 377, 55 Pac. 622; Ward v. Cheney, 117 Ala. 238, 22 So. 996.

⁵²Farmers' Loan & Trust Co. v. Olson, 92 Iowa, 770, 61 N. W. 199; Putnam v. Clark, 33 N. J. Eq. 338.

interlineations do not raise a presumption of fraudulent alteration;⁵³ nor does the fact that defendant's signature had been apparently erased or cancelled, or rewritten over a cancellation, relieve plaintiff of the burden of proving, after a general traverse, that defendant's signature was on the instrument at the time of its delivery.⁵⁴ Material alterations being shown, however, the burden is on plaintiff suing on a note to show that they were made innocently, by a stranger, or for a proper purpose,⁵⁵ or that they were made with the authority or consent of the defendant,⁵⁶ or that they were ratified.⁵⁷

⁵³*Maldaner v. Smith*, 101 Wis. 30, 78 N. W. 140; *Cox v. Palmer*, 3 Fed. 16.

⁵⁴*Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

⁵⁵*Maguire v. Eichmeier*, 119 Iowa, 301, 80 N. W. 395, and cases cited. See, also, *Davis v. Crawford* (Tex. Civ. App.) 53 S. W. 384.

⁵⁶*Emerson v. Opp*, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24; *Glover v. Gentry*, 104 Ala. 222, 16 So. 38; *Shroeder v. Webster*, 88 Iowa, 627, 55 N. W. 569.

⁵⁷*Sneed v. Sabinal Min. & Mill. Co.*, 20 C. C. A. 230, 73 Fed. 925.

CHAPTER XVI.

PAYMENT AND DISCHARGE.

- § 249. How Instrument is Discharged.
 - 1. Payment to Holder.
 - 2. Cancellation.
 - 3. Other Acts Discharging Simple Contracts for the Payment of Money.
 - 4. Principal Debtor Becoming Holder.
- § 250. Instruments Payable at Bank.
- § 251. What Constitutes Payment.
- § 252. Instruments Drawn in Sets.
- § 253. Payment of Bills of Exchange for Honor—Who May Make.
- § 254. Same—Attestation.
- § 255. Same—Declaration Before Payment for Honor.
- § 256. Same—Preference of Parties Offering to Pay for Honor.
- § 257. Same—Effect of Payment on Subsequent Parties.
- § 258. Same—Refusal of Holder to Receive Payment for Honor.
- § 259. Same—Rights of Payer for Honor.
- § 260. Discharge of Parties Secondarily Liable.
- § 261. Who is Primarily Liable.
- § 262. Renunciation.
- § 263. Effect of Payment by Parties Secondarily Liable.
- § 264. Presumptions.
- § 265. Renewal of Liability.

HOW INSTRUMENT DISCHARGED.

- § 249. A negotiable instrument is discharged:
 - 1. By payment made to the holder of the instrument in due course by or on behalf of the principal debtor, or by the party accommodated, where the instrument is made or accepted for accommodation. Payment is made in due course when it is made at or after

the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

2. By the intentional cancellation thereof by the holder; a cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority;
3. By any other act which will discharge a simple contract for the payment of money;
4. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

This section deals with discharge of instrument and hence of the discharge of all parties.¹ Under the familiar maxim that the express mention of one thing implies the exclusion of another, the five methods of discharge herein specified are deemed exclusive.²

A negotiable instrument is discharged by payment in due course by or on behalf of the principal debtor,³ or by the party accommodated, where the instrument is made or accepted for accommo-

¹ *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329.

² *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129.

³ *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 119); *Ariz.* (§ 3422); *Ill.* (§ 118); *Kan.* (§ 126); *Md.* (§ 138); *Mich.* (§ 121); *Neb.* (§ 118); *N. Y.* (§ 200); *Ohio* (§ 3175j); *R. I.* (§ 127); *Wis.* (§ 1679).

American Bank v. Jenness, 43 Mass. (2 Metc.) 288. See, also, *Chrisman's Adm'x v. Harman*, 29 Grat. (Va.) 494, 26 Am. Rep. 387. Payment by indorser not on behalf of principal debtor does not discharge. *Twelfth Ward Bank v. Brooks*, 63 App. Div. 220, 71 N. Y. Supp. 388.

dation.⁴ An acceptor is a principal debtor within the above rule, and a payment by him extinguishes the debt.⁵ But where bills are drawn on letters of credit, instead of actual funds in the hands of the acceptor, the drawer is the principal debtor, and is liable to the acceptor for his advances.⁶ If the acceptor, after the bill has been paid, again puts it in circulation, and is sued thereon, he cannot set up the payment.⁷ Though payment by an accommodation acceptor discharges the instrument, it is still evidence in his hands to charge the real debtor.⁸ Payment by or on behalf of the maker will also discharge the instrument,⁹ and a payment by one of two joint makers satisfies the debt,¹⁰ though the instrument was formally assigned to the payor.¹¹

Payment to holder.

Payment in due course to the holder of a negotiable instrument operates as a discharge of the instrument.¹² Payment is made in

⁴Subdivision 2, same sections of negotiable instruments laws as last above cited.

⁵*Borland v. Phillips*, 3 Ala. 719, where a payment by an accommodation indorser was held not to be a purchase, but to be an extinguishment of the note. See, also, *Roland v. Smith*, 49 Conn. 404.

⁶*Brunswick Bank v. Sewall*, 34 Me. 202; *Saluan v. Relf*, 4 La. Ann. 575; *Whitwell v. Brigham*, 36 Mass. (19 Pick.) 117.

⁷*Turner v. Browder*, 68 Ky. (5 Bush) 216.

⁸*Hinton v. Bank of Columbus*, 9 Port. (Ala.) 463.

⁹*First Nat. Bank v. Maxfield*, 83 Me. 576, 22 Atl. 479.

¹⁰*American Bank v. Jenness*, 43 Mass. (2 Metc.) 288; *Chrisman's Adm'x v. Harman*, 29 Grat. (Va.) 494, 26 Am. Rep. 387.

¹¹*Gillett v. Sweat*, 6 Ill. 475; *Hopkins v. Farwell*, 32 N. H. 425; *Stevens v. Hannan*, 88 Mich. 13, 49 N. W. 874, afg. 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125.

¹²*Swem v. Newell*, 19 Colo. 397, 35 Pac. 734; *Gordon v. Wansey*, 21 Cal. 77; *Kneeland v. Miles* (Tex. Civ. App.) 24 S. W. 1113; *Stevens v. Hannan*, 88 Mich. 13, 49 N. W. 874, afg. 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125.

¹³*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 51); Ariz. (§ 3354); Ill.

due course when it is made at or after maturity to the holder, in good faith, and, without notice that his title is defective.¹³

The negotiability being established, there results the rule that the debtor's duty is to pay to the person who owns the note at the time of payment, or to an agent of such owner actually authorized to receive payment, and that no payment to any other person can be of any effect unless made in actual reliance upon the actual possession of the note, or upon words or acts of the owner so unambiguously declaring the authority of such other person to receive such particular payment as to estop the owner from denying such authority.¹⁴ This rule applies generally to all negotiable paper, independently of the existence of any mortgage or other security.¹⁵ Possession of the instrument is ordinarily

(§ 51); Kan. (§ 58); Md. (§ 70); Mich. (§ 53); Neb. (§ 51); N. Y. (§ 90); Ohio (§ 3172w); R. I. (§ 59); Wis. (§ 1676-21).

Ellsworth v. Fogg, 35 Vt. 355; *Greve v. Schweitzer*, 36 Wis. 554.

¹³Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 88); Ariz. (§ 3391); Ill. (§ 87); Kan. (§ 95); Md. (§ 107); Mich. (§ 90); Neb. (§ 87); N. Y. (§ 148); Ohio (§ 3174f); R. I. (§ 96); Wis. (§ 1678-18).

On the maturity of a note, the maker has an absolute right to pay and thus relieve himself from the payment of further interest; and if, without further agreement, he neglects to pay it when due, he still has the right to pay it at any subsequent time. *Lahn v. Koep*, 139 Iowa, 349, 115 N. W. 877.

¹⁴The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time, or to such owner's duly authorized agent. If the recipient of money is not actually authorized, the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. *Marling v. Nommensen*, 127 Wis. 363, 106 N. W. 844, 115 Am. St. Rep. 1017, 5 L. R. A. (N. S.) 412. The owner, by clothing another with the indicia of ownership and ostensible authority to contract with the maker of the note for the discharge thereof, may become estopped to deny the authority of such person to act in the premises. *Home Savings Bank v. Stewart*, 78 Neb. 624, 110 N. W. 947.

¹⁵*Marling v. Nommensen*, 127 Wis. 363, 106 N. W. 844, 115 Am. St. Rep. 1017, 5 L. R. A. (N. S.) 412.

prima facie evidence of the right to receive payment,¹⁶ and is generally regarded the sole adequate evidence of apparent authority to collect upon which the debtor has any right to rely, or can, without negligence, do so. Commercial paper has always been favored in the law, not less for the ultimate benefit of the giver than of the holder, and the rule just referred to is in line with that policy. It is so simple, and, once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves against unauthorized acts of others that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment without actual presentation. It is justified in application to negotiable paper as distinguished from other property by the very dominant purpose of easy and probable transfer at any moment, so that what may be true as to ownership of such paper at one moment is likely to have changed by another. Of the probability of such change, the negotiability of the instrument is a continual warning.¹⁷ But possession by one person does not authorize payment to him if there is a formal assignment to another on the back of the note.¹⁸ A payment to the original payee after the instrument has been properly indorsed or transferred will not extinguish it,¹⁹ unless the payment is shown to have been made by the authority or with the consent of the holder, or to have been subsequently accepted or ratified by him.²⁰

By cancellation of instrument—Intent.

A negotiable instrument is discharged by the intentional can-

¹⁶*Paulman v. Claycomb*, 75 Ind. 64; *Cothran v. Collins*, 29 How. Pr. (N. Y.) 113.

¹⁷*Loizeaux v. Fremder*, 123 Wis. 193, 101 N. W. 423.

¹⁸*Pier v. Bullis*, 48 Wis. 429, 4 N. W. 381. A stranger who pays a note at maturity to the holder is presumed to have paid it, and not to have purchased it. *Lee v. Field*, 9 N. M. 435, 54 Pac. 873.

¹⁹*Wilkinson v. Sargent*, 9 Iowa, 521; *Harpending v. Gray*, 76 Hun, 351, 27 N. Y. Supp. 762; *Perry v. Bray*, 68 Ga. 293.

²⁰*City Bank v. Taylor*, 60 Iowa, 66, 14 N. W. 128; *Enright v. Beaumont*, 68 Vt. 249, 35 Atl. 57.

cancellation thereof by the holder;²¹ but a cancellation made unintentionally, or by mistake, or without authority of the holder, is inoperative.²² Where an instrument or any signature thereon appears to have been canceled, the burden of proof rests on the party who alleges that the cancellation was made unintentionally, or by mistake, or without authority.²³

Application of rules governing contracts.

In addition to the above modes of discharging negotiable instruments, it is a general rule that they are discharged by any act which will discharge any simple contract for the payment of money.²⁴ But an agreement binding on the holder to extend the time of payment does not discharge the instrument nor parties primarily liable.²⁵

Where principal debtor becomes holder.

A negotiable instrument is discharged when the principal debtor becomes the holder thereof, at or after maturity in his own right.²⁶ The words in his own right merely exclude the case of

²¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 119); Ariz. (§ 3422); Ill. (§ 118); Kan. (§ 126); Md. (§ 138); Mich. (§ 121); Neb. (§ 118); N. Y. (§ 200); Ohio (§ 3175j); R. I. (§ 127); Wis. (§ 1679).

Larkin v. Hardinbrook, 90 N. Y. 333, 43 Am. Rep. 176 and cases cited.

²²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 123); Ariz. (§ 3426); Ill. (§ 122); Kan. (§ 130); Md. (§ 142); Mich. (§ 125); Neb. (§ 122); N. Y. (§ 204); Ohio (§ 3175n); R. I. (§ 131); Wis. (§ 1679-4).

²³Same sections of negotiable instruments laws as last above cited.

²⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 119); Ariz. (§ 3422); Ill. (§ 118); Kan. (§ 126); Md. (§ 138); Mich. (§ 121); Neb. (§ 118); N. Y. (§ 200); Ohio (§ 3175j); R. I. (§ 127); Wis. (§ 1679).

²⁵Accommodation maker. Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329.

²⁶Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La.,

the maker acquiring the note in a purely representative capacity.²⁷ Under this rule an assignment of the instrument to one joint maker extinguishes it,²⁸ and so does an indorsement to the acceptor or maker;²⁹ but a purchase by the maker as agent for a third person does not ordinarily extinguish the instrument.³⁰ Where the holder surrenders the note to the maker on part payment and promise to pay the balance, he cannot subsequently maintain an action against the maker on the note to recover the balance thereof.³¹

INSTRUMENTS PAYABLE AT BANK.

§ 250. Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.³² Where the instrument is made pay-

Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§119); Ariz. (§ 3422); Ill. (§ 118); Kan. (§ 126); Md. (§ 138); Mich. (§ 121); Neb. (§ 118); N. Y. (§ 200); Ohio (§ 3175j); R. I. (§ 127); Wis. (§ 1679).

²⁷*Schwartzman v. Post*, 94 App. Div. 474, 84 N. Y. Supp. 922, 87 N. Y. Supp. 872.

²⁸*See Stevens v. Hannan*, 88 Mich. 13, 49 N. W. 874; *Kneeland v. Miles* (Tex. Civ. App.) 24 S. W. 1113.

²⁹*Beede v. Real Estate Bank, Pike* (Ark.) 546; *Long v. Bank of Cynthiana*, 11 Ky. (1 Litt.) 290, 13 Am. Dec. 234.

³⁰*Bowman v. St. Louis Times*, 87 Mo. 191; *Dubois v. Stoner*, 11 Ill. App. 403. But contra, see *Cason v. Heath*, 86 Ga. 438, 12 S. E. 678; *White v. Fisher*, 62 Ill. 258; *Eastman v. Plumer*, 32 N. H. 238.

³¹*Schwartzman v. Post*, 94 App. Div. 474, 84 N. Y. Supp. 922, 87 N. Y. Supp. 872.

³²*Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 87); Ariz. (§ 3390); Kan. (§ 94); Md. (§ 106); Mich. (§ 89); N. Y. (§ 147); Ohio (§ 3174e); R. I. (§ 95); Wis. (§ 1678-17).

able at a bank, and is left there for collection, the bank is entitled to receive payment as agent of the payee or holder;³³ but if the instrument, though payable at a bank, is not left there for collection, payment to the bank does not satisfy it, because the bank, in receiving the money in such case, acts only as agent of the maker or payor.³⁴

WHAT CONSTITUTES PAYMENT.

§ 251. In the absence of an agreement to the contrary, payment must be made in money.

Since the contract in a negotiable instrument is to pay money, it is not performed—that is, the instrument is not paid—by turning over to the creditor anything but money, unless there was an agreement to accept other property in payment.³⁵

Accounts and credits in favor of the debtor do not constitute payment unless there was an agreement to that effect;³⁶ but

Bedford Bank v. Acoam, 125 Ind. 584, 25 N. E. 713, 21 Am. St. Rep. 258, 9 L. R. A. 560, where the court held that the law would imply authority from the depositor by reason of his making the instrument negotiable and payable at the bank. A "bank," within the meaning of the negotiable instruments laws, includes "any person or association of persons carrying on the business of banking, whether incorporated or not." *Neg. Inst. Laws* Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 191); *Ariz.* (§ 3487); *Ill.* (§ 190); *Kan.* (§ 2); *Md.* (§ 14); *Mich.* (§ 2); *Neb.* (§ 189); *N. Y.* (§ 2); *Ohio* (§ 3178); *R. I.* (§ 2); *Wis.* (§ 1675).

³³*Smith v. Essex County Bank*, 22 Barb. (N. Y.) 627; *Ward v. Smith*, 74 U. S. (7 Wall.) 447, 19 Law. Ed. 207; *Lazier v. Horan*, 55 Iowa, 75, 7 N. W. 457, 39 Am. Rep. 167. But see *Sutherland v. First Nat. Bank*, 31 Mich. 230.

³⁴*St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189; *First Nat. Bank v. Chilson*, 45 Neb. 257, 63 N. W. 362; *Hill v. Place*, 36 How. Pr. 26, 5 Abb. Pr. (N. Y.) 18.

³⁵*Graydon v. Patterson*, 13 Iowa, 256, 81 Am. Dec. 432; *Heath v. Silverthorn Lead M. & S. Co.*, 39 Wis. 146.

³⁶*Rugland v. Thomson*, 48 Minn. 539, 51 N. W. 604; *Bettison v. Jennings*, 6 Eng. 116.

where, by agreement of the persons, any balance found due on a settlement between two of them is to be credited on a note executed by them to the third, such balance, when found, operates as a payment.³⁷ The mere acceptance of collateral security does not operate as a payment;³⁸ but a payment and satisfaction of the security operates as a payment of the instrument secured.³⁹ So, also, an agreement to rely on the security may amount to a payment, as where a bank at which a note secured by chattel mortgage was payable agreed that it would look to the mortgaged property alone, it released the maker, if at the date of the agreement such property was sufficient to pay the note, though it had depreciated in value at the time the mortgage was foreclosed.⁴⁰ Other notes, whether renewals or not, do not operate as payment unless it is so agreed,⁴¹ and the same rule applies to checks or drafts taken by the payee or holder.⁴² The intention of the parties governs in this class of cases, and, if the new instrument was intended as payment, it will so operate, though the old

³⁷*Vawter v. Griffin*, 40 Ind. 593.

³⁸*Hook v. White*, 36 Cal. 299; *Mohawk Bank v. Van Horne*, 7 Wend. (N. Y.) 117; *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Sterling v. Marietta & S. Trading Co.*, 11 Serg. & R. (Pa.) 179.

³⁹*Gilliam v. Davis*, 7 Wash. 332, 35 Pac. 39; *Sampson v. Fox*, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950; *Bodley v. Anderson*, 2 Ill. App. 450; *Kent v. May*, 13 Mich. 38.

⁴⁰*First Nat. Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275.

⁴¹*Chisholm v. Williams*, 128 Ill. 115, 21 N. E. 215; *Moses v. Trice*, 21 Grat. (Va.) 556, 8 Am. Rep. 609; *Boston Nat. Bank v. Jose*, 10 Wash. 185, 38 Pac. 1026; *Holland Trust Co. v. Waddell*, 75 Hun, 104, 26 N. Y. Supp. 980; *Hadden v. Dooley*, 92 Fed. 274; *Savings Bank of San Diego County v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273; *First Nat. Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445. Acceptance of a forged renewal note does not constitute a payment of the first note. *Central Nat. Bank v. Copp*, 184 Mass. 328, 68 N. E. 334.

⁴²*Burkhalter v. Second Nat. Bank*, 42 N. Y. 538, 40 How. Pr. (N. Y.) 324; *Western Brass Mfg. Co. v. Maverick*, 4 Tex. Civ. App. 535, 23 S. W. 728; *Hamill v. German Nat. Bank*, 13 Colo. 203, 22 Pac. 438. A bank receiving a draft for collection must collect it in money, and, if it takes a check of the debtor instead, it does so at its peril. *National Bank of Commerce v. American Exchange Bank*, 151 Mo. 320, 52 S. W. 265, 14 Am. St. Rep. 527.

instrument was not surrendered,⁴³ but will not so operate if it is worthless or invalid.⁴⁴ While ordinarily a check given in satisfaction of a debt is merely deemed a provisional payment, still such payment becomes absolute when the creditor, or his agent, indorses the creditor's name on the check and negotiates it.⁴⁵ Merely placing the consideration to the credit of the seller upon the books of the purchaser does not constitute payment.⁴⁶

INSTRUMENTS DRAWN IN SETS.

§ 252. Where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Exception.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

It is a general rule that payment of any one part of a set operates as a payment and discharge of the whole set.⁴⁷ The acceptor

⁴³Woodbridge v. Skinner, 15 Conn. 306; French v. French, 84 Iowa, 655, 51 N. W. 145, 15 L. R. A. 300; First Nat. Bank v. Getz, 96 Iowa, 139, 64 N. W. 799. The rule seems to be different in New York. See East River Bank v. Butterworth, 45 Barb. (N. Y.) 476; Schmidt v. Livingston, 16 Misc. 554, 38 N. Y. Supp. 746.

⁴⁴Lovinger v. First Nat. Bank, 81 Ind. 354; Ramsdell v. Soule, 29 Mass. (12 Pick.) 126; Hughes v. Wheeler, 8 Cow. (N. Y.) 77. The surrender of a genuine note in exchange for an instrument purporting to be a renewal note but which is in fact a forgery does not extinguish the surrender note, which, although not to be found, still can be sued upon by the holder thus forced to give it up. Bass v. Wellesley, 192 Mass. 526, 76 N. E. 543.

⁴⁵Kramer v. Grant, 60 Misc. 109, 111 N. Y. Supp. 709.

⁴⁶See Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.

⁴⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 183); Ariz. (§ 3486); Ill. (§ 182); Kan. (§ 190); Md. (§ 202); Mich. (§ 185); Neb. (§ 182); N. Y. (§ 315); Ohio (§ 3177t); R. I. (§ 191); Wis. (§ 1681-40).

of a bill drawn in a set should, on payment of the part bearing his acceptance, require such part to be surrendered to him. If he pays without requiring such surrender, he is liable, notwithstanding the payment, to a holder in due course.⁴⁸

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

- § 253. Where a bill has been protested for nonpayment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.
- § 254. The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.
- § 255. The notarial act of honor must be founded on a declaration made by the payor for honor, or by his agent in that behalf, declaring his intention to pay the bill for honor and for whose honor he pays.

Durkin v. Cranston, 7 Johns. (N. Y.) 442; Ingraham v. Gibbs, 2 Dall. (Pa.) 134; Downes v. Church, 38 U. S. (13 Pet.) 205, 10 Law. Ed. 124.

⁴⁸Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 182); Ariz. (§ 3485); Ill. (§ 181); Kan. (§ 189); Md. (§ 201); Mich. (§ 184); Neb. (§ 181); N. Y. (§ 314); Ohio (§ 3177s); R. I. (§ 190); Wis. (§ 1681-39).

See Holden v. Davis, 57 Miss. 769. In this case two bills, while for the same amount, were not intended as duplicates of each other, but together represented the whole amount intended to be paid. One was accepted, the other was not, but the acceptor paid the unaccepted bill by mistake, and was sued on the accepted bill. Held that the payment of the unaccepted bill was neither a defense nor a good set-off. When the instrument is paid it must be delivered up to the person paying it. Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 74); Ariz. (§ 3377); Ill. (§ 74); Kan. (§ 81); Md. (§ 93); Mich. (§ 76); Neb. (§ 74); N. Y. (§ 134); Ohio (§ 3173s); R. I. (§ 82); Wis. (§ 1678-4).

- § 256. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.
- § 257. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.
- § 258. Where the holder of a bill refuses to receive payment *supra protest*, he loses his right of recourse against any party who would have been discharged by such payment.
- § 259. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

Payment of bills of exchange for honor—Who may make.

A bill being protested for nonpayment, any person may intervene and pay it *supra protest* for the honor of any person liable thereon, or for the honor of the person for whose account it was drawn.⁴⁹

Same—Attestation.

In order to be effective as such and not merely to operate as a voluntary payment, a payment for honor *supra protest* must be

⁴⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 171); Ariz. (§ 3474); Ill. (§ 170); Kan. (§ 178); Md. (§ 190); Mich. (§ 173); Neb. (§ 170); N. Y. (§ 300); Ohio (§ 3177h); R. I. (§ 179); Wis. (§ 1681-28).

Konig v. Bayard, 26 U. S. (1 Pet.) 250, 7 Law. Ed. 558. Payment for honor cannot be made before protest. Baring v. Clark, 36 Mass. (19 Pick.) 220; Gazzam v. Armstrong, 33 Ky. (3 Dana) 554.

attested by a notarial act of honor, which may be appended to the protest, or form an extension to it.⁵⁰

Same—Declaration before payment for honor.

It is essential that the notarial act of honor be founded on a declaration made by the payer for honor, or by his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays.⁵¹

Same—Preference of parties offering to pay for honor.

Two or more persons offering to pay a bill for the honor of different persons, the person whose payment will discharge most parties to the bill is to be given the preference.⁵²

Same—Effect of payment on subsequent parties.

A bill having been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays, and all parties liable to the latter.⁵³

⁵⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 172); Ariz. (§ 3475); Ill. (§ 171); Kan. (§ 179); Md. (§ 191); Mich. (§ 174); Neb. (§ 171); N. Y. (§ 301); Ohio (§ 3177i); R. I. (§ 180); Wis. (§ 1681-29).

See *Gazzam v. Armstrong*, 33 Ky. (3 Dana) 554.

⁵¹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 173); Ariz. (§ 3476); Ill. (§ 172); Kan. (§ 180); Md. (§ 192); Mich. (§ 175); Neb. (§ 172); N. Y. (§ 302); Ohio (§ 3177j); R. I. (§ 181); Wis. (§ 1681-30).

See *Gazzam v. Armstrong*, 33 Ky. (3 Dana) 554.

⁵²Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 174); Ariz. (§ 3477); Ill. (§ 173); Kan. (§ 181); Md. (§ 193); Mich. (§ 176); Neb. (§ 173); N. Y. (§ 303); Ohio (§ 3177k); R. I. (§ 182); Wis. (§ 1681-31).

⁵³Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La.,

Same—Refusal of holder to receive payment for honor.

The holder refusing payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.⁵⁴

Same—Rights of payer for honor.

The payer for honor, on payment to the holder of the amount of the bill, and the notarial expenses incident to its dishonor, is entitled to receive both the bill itself and the protest.⁵⁵

DISCHARGE OF PARTIES SECONDARILY LIABLE.

§ 260. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;

Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 175); Ariz. (§ 3478); Ill. (§ 174); Kan. (§ 182); Md. (§ 194); Mich. (§ 177); Neb. (§ 174); N. Y. (§ 304); Ohio (§ 31771); R. I. (§ 183); Wis. (§ 1681-32).

See *McDowell v. Cook*, 14 Miss. (6 Smedes & M.) 420, 45 Am. Dec. 289.

⁵⁴Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 176); Ariz. (§ 3479); Ill. (§ 175); Kan. (§ 183); Md. (§ 195); Mich. (§ 178); Neb. (§ 175); N. Y. (§ 305); Ohio (§ 3177m); R. I. (§ 184); Wis. (§ 1681-33).

⁵⁵Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 177); Ariz. (§ 3480); Ill. (§ 176); Kan. (§ 184); Md. (§ 196); Mich. (§ 179); Neb. (§ 176); N. Y. (§ 306); Ohio (§ 3177n); R. I. (§ 185); Wis. (§ 1681-34).

As to the right of the payer for honor to reimbursement, see *Grosvenor v. Stone*, 25 Mass. (8 Pick.) 79; *Leake v. Burgess*, 13 La. Ann. 156. A voluntary payment without request does not give a right to reimbursement. *Willis v. Hobson*, 37 Me. 403.

3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved;
7. In some states by misapplication of securities or funds applicable to debt.

The methods of discharge stated are exclusive.⁵⁶ A person secondarily liable on the instrument is discharged by any act which discharges the instrument itself.⁵⁷ He is also discharged by the intentional cancellation of his signature by the holder,⁵⁸ by the discharge of a prior party,⁵⁹ or by a valid tender of payment made

⁵⁶Vanderford v. Farmers' & Mechanics' Nat. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129.

⁵⁷Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 120); Ariz. (§ 3423); Ill. (§ 119); Kan. (§ 127); Md. (§ 139); Mich. (§ 122); Neb. (§ 119); N. Y. (§ 201); Ohio (§ 3175k); R. I. (§ 128); Wis. (§ 1679-1).

⁵⁸Subdivision 2, same sections of negotiable instruments laws as last above cited.

See ante, § 249.

⁵⁹Subdivision 3, same sections of negotiable instruments laws as last above cited.

Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193. Discharge of maker discharges indorser. Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588; Union Nat. Bank v. Grant, 48 La. Ann. 18, 18 So. 705. Discharge of indorser releases subsequent indorser. State of New York Nat. Bank v. Coykendall, 58 Hun (N. Y.) 205, 12 N. Y. Supp. 334, 53 Am. Rep. 231; Plankinton v. Gorman, 93 Wis. 560, 67 N. W. 1128.

by a prior party.⁶⁰ A release of the principal debtor discharges a party secondarily liable, unless the holder's right of recourse against the party secondarily liable is expressly reserved.⁶¹

By agreement extending time of payment, or postponing right to enforce instrument.

A party secondarily liable is also discharged by any agreement, binding on the holder, to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.⁶² A provision in a note payable on or before a date named, seeking to evade this clause and providing that the makers and indorsers consent that the time of payment may be extended without notice, does not render the note non-negotiable.⁶³ Mere delay will not discharge a person secondarily liable. There must be a valid agreement to extend the time or vary the contract,⁶⁴ and this agreement must be supported by a new consideration.⁶⁵ If, however, the liability of a party secondarily liable has become fixed, he will not be discharged by a subsequent extension of time given

⁶⁰Subdivision 4, same sections of negotiable instruments laws as last above cited.

⁶¹Subdivision 5, same sections of negotiable instruments laws as last above cited.

Ziegfried v. Stein, 117 N. Y. Supp. 900.

See *Ludwig v. Iglehart*, 43 Md. 39; *Gloucester Bank v. Worcester*, 27 Mass. (10 Pick.) 527; *Eldrege v. Chacon*, Crabbe, 296.

⁶²Subdivision 6, same sections of negotiable instruments laws as last above cited.

First Nat. Bank v. Lineberger, 83 N. C. 454, 35 Am. Rep. 582; *Place v. McIlvan*, 1 Daly, 266, 38 N. Y. 96, 97 Am. Dec. 777; *Stein v. Steindler*, 1 Misc. 414, 20 N. Y. Supp. 839; *Commercial Bank of Lexington v. Wood*, 56 Mo. App. 214. Where holder of note agreed with maker not to press the suit commenced thereon while certain monthly payments should continue to be made, indorsers were held discharged. *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421.

⁶³*First Nat. Bank v. Buttery* (N. D.) 116 N. W. 341.

⁶⁴*Way v. Dunham*, 166 Mass. 263, 44 N. E. 220; *Smith v. Erwin*, 77 N. Y. 466.

⁶⁵*Friedenberg v. Robinson*, 14 Fla. 130. Part payment is not sufficient consideration. *Manchester v. Van Brunt*, 2 Misc. 228, 22 N. Y. Supp. 362

to the maker.⁶⁶ The negotiable instruments law as adopted in Wisconsin has additional provisions, negating a discharge by such agreements if they were made with the assent of the person secondarily liable, or if he has been fully indemnified.⁶⁷

By misapplication of securities or funds applicable to debt.

Another addition has been made by the Wisconsin negotiable instruments law by the provision that a person secondarily liable is discharged "by giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands, or within his control, the means of complete or partial satisfaction, the same are applied to other purposes."⁶⁸ In this class of cases, "the original contract is not changed in terms between any of the parties, but a collateral indemnity, held in trust by the creditor, and upon which the surety has a right to rely, has been destroyed, and he is presumed to have suffered loss by the surrender of the security. The creditor, having misapplied the trust fund, and acted in bad faith toward the surety, must be held to have released the surety in equity, or, rather, to be estopped from looking to him for payment, by reason of his bad faith in discharging his duty to the trust fund held for their common security."⁶⁹

⁶⁶State Bank v. Wilson, 12 N. C. (1 Dev.) 484; Pequet v. Dimitry, 3 La. 385.

⁶⁷Negotiable Inst. Law, § 1679-1.

⁶⁸Negotiable Inst. Law, § 1679-1, subd. 4a.

Haslett v. Ehrick, 1 Nott & McC. (S. C.) 116; Union Nat. Bank v. Cooley, 27 La. Ann. 202. In order to discharge the indorser, collateral security released by the holder must be valid security. *Id.* Equity will not relieve an indorser who has not used diligence to protect himself against the loss of security by prior parties. Mahone v. Central Bank, 17 Ga. 111. See, also, Brown v. Nichols, 123 Ind. 492, 24 N. E. 339; Kirkpatrick v. Hawk, 80 Ill. 122.

⁶⁹Rogers v. School Trustees, 46 Ill. 428.

WHO PRIMARILY LIABLE. •

§ 261. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay same. All other parties are "secondarily" liable.

Under the terms of the act, all who are absolutely required to pay the instrument are primarily liable thereon;⁷⁰ this includes an accommodation maker⁷¹ and a surety.⁷²

RENUNCIATION.

§ 262. The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A re-

⁷⁰Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 192); Ariz. (§ 3488); Ill. (§ 191); Kan. (§ 3); Md. (§ 15); Mich. (§ 2); Neb. (§ 190); N. Y. (§ 3); Ohio (§ 3178a); R. I. (§ 3); Wis. (§ 1675).

⁷¹Vanderford v. Farmers' & Mechanics' Nat. Bank, 115 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; National Citizens' Bank v. Topfritz, 81 App. Div. 593, 81 N. Y. Supp. 422; Cellers v. Meachem, 49 Or. 186, 89 Pac. 426. In this case the court bases its decision in the following reasoning: Since the act makes an accommodation maker primarily liable, and "in one section designates how negotiable instruments may be discharged, but contains no provision whereby a person primarily liable can be released, except by payment, etc., and in the section following specifies the manner in which persons secondarily liable may be relieved of responsibility on such instrument, it follows that the immunities indicated were intended to exclude all exceptions not contained therein under the familiar maxim 'Expressio unius est exclusio alterius.'" Cellers v. Meachem, 49 Or. 186, 89 Pac. 426.

⁷²Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875.

nunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity.⁷³ An absolute and unconditional renunciation of his right against the principal debtor, made at or after the maturity of the instrument, discharges it, but a renunciation does not affect the rights of a holder in due course without notice.⁷⁴ The first relates to the party; the second to the instrument,⁷⁵ and the two are perfectly consistent.⁷⁶ A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.⁷⁷ The corresponding provision of the English Bills of Exchange Act 1882 is to the same effect. It has been held under this subdivision that a parol renunciation by the holder of all rights under a promissory note is inoperative unless the note is delivered up to the "maker" or "acceptor," and that a devisee of the maker is not within the term "maker," though an executor or administrator of the maker might be included in the term.⁷⁸

⁷³Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 122); Ariz. (§ 3425); Ill. (§ 121); Kan. (§ 129); Md. (§ 141); Mich. (§ 124); Neb. (§ 121); N. Y. (§ 203); Ohio (§ 3175-m); R. I. (§ 130); Wis. (§ 1679-3).

⁷⁴Same sections of negotiable instruments laws as last above cited.

⁷⁵Leask v. Dew, 102 App. Div. 529, 92 N. Y. Supp. 891.

⁷⁶Remarks to contrary, in Leask v. Dew, 102 App. Div. 529, 92 N. Y. Supp. 891, are believed erroneous.

⁷⁷Same sections of negotiable instruments laws as last above cited.

Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724. Paper, found after payee's death, stating he wished note canceled, or if that was illegal his heirs should be notified of his orders, held not a renunciation. Leask v. Dew, 102 App. Div. 529, 92 N. Y. Supp. 891. Three hours before a payee's death the nurse in attendance upon him wrote the following note at his dictation: "30th August, 1889. It is by Mr. George's dying wish that the cheque (sic) for £2,000 money lent to Mrs. Francis be destroyed as soon as found." Held not a sufficient renunciation to discharge the note. In re George, 44 Ch. Div. 627.

⁷⁸45 & 46 Vict. c. 61, § 62, subd. 1. Edwards v. Walters [1896] 2 Ch. 157.

EFFECT OF PAYMENT BY PARTY SECONDARILY LIABLE.

§ 263. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except;

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

Payment by person secondarily liable does not discharge instrument.

Where the instrument is paid to a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties,⁷⁹ except where the instrument is payable to the order of a third person and has been paid by the drawer,⁸⁰ or where it has been made or accepted for accommodation, and has been paid by the party accommodated.⁸¹ This section is intended to apply where the per-

⁷⁹Neg. Inst. Laws Colo., Conn., D. C., Fla., Idaho, Iowa, Ky., La., Mass., Mo., Mont., Nev., N. H., N. J., N. M., N. C., N. D., Okl., Or., Pa., Tenn., Utah, Va., Wash., W. Va., Wyo. (§ 121); Ariz. (§ 3424); Ill. (§ 120); Kan. (§ 128); Md. (§ 146); Mich. (§ 123); Neb. (§ 120); N. Y. (§ 202); Ohio (§ 3175-L); R. I. (§ 129); Wis. (§ 1679-2).

French v. Jarvis, 29 Conn. 347; Eaton v. Carey, 27 Mass. (10 Pick.) 211; Stevens v. Hannan, 88 Mich. 13, 49 N. W. 874, afg. 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125; Havens v. Huntington, 1 Cow. (N. Y.) 387; Davis v. Miller, 14 Grat. (Va.) 1.

⁸⁰Same sections negotiable instruments laws last cited.

Payment by indorser discharges his own liability and that of all subsequent indorsers. Keazer v. Colebrook Nat. Bank (N. H.) 73 Atl. 170.

⁸¹Same sections negotiable instruments laws last cited.

Marling v. Jones, 138 Wis. 82, 119 N. W. 931.

son secondarily liable can trace his title on the face of the note, and its indorsements through the prior parties whom he seeks to hold.⁸² Subsequent indorsement must be held to mean subsequent in point of liability.⁸³ A payment by an indorser does not extinguish the holder's rights against the maker,—for, as between the maker and the indorser, the transaction is a purchase and not a payment.⁸⁴

Same—Striking out indorsements, and issuing instrument.

On payment by a party secondarily liable, he may strike out his own and all subsequent indorsements and again negotiate, except, where it is payable to the order of a third person, and has been paid by the drawer, and where it was made or accepted for accommodation, and has been paid by the party accommodated.⁸⁵

PRESUMPTIONS.

§ 264. An outstanding instrument is prima facie presumed a subsisting obligation.

The presumption that outstanding instrument in the hands of the original payee is a subsisting undischarged obligation, while

⁸²Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671.

⁸³Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671. Thus, where an indorser before delivery paid the note and the payee before delivering it to him struck out his indorsement, held he could not renegotiate the note. *Id.* Has action against maker but not on note. *Id.*

⁸⁴Madison Square Bank v. Pierce, 137 N. Y. 444, 33 N. E. 557, 33 Am. St. Rep. 751, 20 L. R. A. 335, affg. 62 Hun, 493, 17 N. Y. Supp. 270.

⁸⁵Same sections of negotiable instruments laws as last above cited.

Payment by an indorser leaves the instrument still negotiable as to prior parties. French v. Jarvis, 29 Conn. 347; Eaton v. Carey, 27 Mass. (10 Pick.) 211; Davis v. Miller, 14 Grat. (Va.) 1. Reissuance by accommodation indorser after payment by him, see Kirksey v. Bates, 1 Ala. 303. Right of contribution between accommodation indorsers on payment by one or more of their number, see Kelly v. Burrough, 102 N. Y. 93, 6 N. E. 109; Hull v. Myers, 90 Ga. 674, 16 S. E. 653; Hagerthy v. Phillips, 83 Me. 336, 22 Atl. 223; Newcomb v. Gibson, 127 Mass. 393.

very strong, is not conclusive,⁸⁶ and where it is met by opposing presumptions arising out of the fact of the case, the question of payment becomes one of fact.⁸⁷

RENEWAL OF LIABILITY.

§ 265. After discharge, a renewal of liability, by an indorser, must be by a new contract.

An indorser having been entirely discharged from liability, any renewal of his liability must be by a new contract.⁸⁸ It follows that the giving of a new check or note after the loss or destruction of a former one is of itself alone ambiguous and may evince intent to enter into new relations, or merely supply evidence of those already existing, according to the surrounding circumstances.⁸⁹

⁸⁶In re McMichan's Estate, 220 Pa. 187, 69 Atl. 596.

⁸⁷In re McMichan's Estate, 220 Pa. 187, 69 Atl. 596. Presumption held rebutted where subsequent to its date the payee had in his hands the means of payment which he made no attempt to apply but paid over without deduction. *Id.*

⁸⁸Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 109 Am. St. Rep. 925, 68 L. R. A. 964.

⁸⁹Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 109 Am. St. Rep. 925, 68 L. R. A. 964. Where new check was dated back to date of lost one and marked "duplicate," held not a new contract. *Id.*

APPENDIX A.

ORIGINAL DRAFT OF THE NEGOTIABLE INSTRUMENT LAW AS SUBMITTED TO THE VARIOUS STATE LEGISLATURES AND TO CONGRESS.

The section numbers given are those of the Original Draft and are the numbers used in the law as adopted in Alabama, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia and Wyoming.

The section numbers of the law as adopted in Arizona, Illinois, Kansas, Maryland, Michigan, Nebraska, New Hampshire, New York, Ohio, Rhode Island and Wisconsin differ from those herewith given and may be found by consulting Appendix "B" where references are given from all the sections as found in the Original Draft to the corresponding sections in the law as adopted in the states just mentioned. The numbers in brackets at the end of the various sections or part of the act as here printed refer to the pages of this work where the subject-matter of the section in question is considered.

A General Act Relating to Negotiable Instruments
(Being An Act to Establish a Law Uniform
With the Laws of Other States
on That Subject).

TITLE I.

NEGOTIABLE INSTRUMENTS IN GENERAL.

ARTICLE I.

FORM AND INTERPRETATION.

§ 1. Be it enacted, etc., An instrument to be negotiable must conform to the following requirements [41] :—

1. It must be in writing and signed by the maker or drawer [18, 28, 40] ;
2. Must contain an unconditional promise or order to pay a sum certain in money [45, 48, 55, 62, 194] ;
3. Must be payable on demand, or at a fixed or determinable future time [64] ;
4. Must be payable to order or to bearer [71] ; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty [83].

§ 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid [55] :—

1. With interest [55] ; or
2. By stated instalments [56] ; or
3. By stated instruments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due [57] ; or

4. With exchange, whether at a fixed rate or at the current rate [58]; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity [59].

§ 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:—

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount [50]; or
2. A statement of the transaction which gives rise to the instrument [51, 52].

But an order or promise to pay out of a particular fund is not unconditional [52].

§ 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:—

1. At a fixed period after date or sight [67]; or
2. On or before a fixed or determinable future time specified therein [69]; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain [70].

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect [70].

§ 5. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable [91]. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:—

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity [86]; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity [89]; or
3. Waives the benefit of any law intended for the advantage or protection of the obligator [89]; or
4. Gives the holder an election to require something to be done in lieu of payment of money [90].

But nothing in this section shall validate any provision or stipulation otherwise illegal [90].

§ 6. The validity and negotiable character of an instrument are not affected by the fact that [142] :—

1. It is not dated [19, 42] ; or
2. Does not specify the value given, or that any value has been given therefor [44] ; or
3. Does not specify the place where it is drawn or the place where it is payable [19, 85] ; or
4. Bears a seal [43] ; or
5. Designates a particular kind of current money in which payment is to be made [63].

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument [44].

§ 7. An instrument is payable on demand :—

1. Where it is expressed to be payable on demand, or at sight, or on presentation [65] ; or
2. In which no time for payment is expressed [66].

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand [66].

§ 8. The instrument is payable to order when it is drawn payable to the order of a specified person or to him or his order [73]. It may be drawn payable to the order of :—

1. A payee who is not maker, drawer, or drawee [73] ; or
2. The drawer or maker [73] ; or
3. The drawee [74] ; or
4. Two or more payees jointly [74] ; or
5. One or some of several payees [12, 13, 75, 84] ; or
6. The holder of an office for the time being [75].

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty [81].

§ 9. The instrument is payable to bearer [76, 82] :—

1. When it is expressed to be so payable [76] ; or
2. When it is payable to a person named therein or bearer [76] ;
or
3. When it is payable to the order of a fictitious or nonexistent

person, and such fact was known to the person making it so payable [77] ; or

4. When the name of the payee does not purport to be the name of any person [80] ; or
5. When the only or last indorsement is an indorsement in blank [81, 170].

§ 10. The instrument need not follow the language of this act but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof [41].

§ 11. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance, or indorsement as the case may be [21, 132, 142, 183].

§ 12. The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery [23].

§ 13. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly [20, 141]. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but, as to him, the date so inserted is to be regarded as the true date [22, 141].

§ 14. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein [24]. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount [25]. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time [21, 26, 142]. But if any such instrument, after completion,

is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time [27, 235].

§ 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery [24, 237].

§ 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto [35, 163, 167]. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be [36, 164], and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument [36, 164]. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed [164]. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved [37, 164, 238].

§ 17. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:—

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount [107];
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof [108];
3. Where the instrument is not dated, it will be considered to be dated, as of the time it was issued [20, 42, 109];

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail [110];
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election [111];
6. Where a signature is so placed upon the instrument that it is **not clear in what capacity** the person making the same intended to sign, he is to be deemed an indorser [111, 195];
7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon [111, 112].

§ 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name [30, 31, 189, 243].

§ 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency [30].

§ 20. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized [31]; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability [32].

§ 21. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority [34].

§ 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon [179, 205].

§ 23. Where a signature is forged or made without the au-

thority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority [307].

ARTICLE II.

CONSIDERATION.

§ 24. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value [92, 93, 139].

§ 25. Value is any consideration sufficient to support a simple contract [95]. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time [95, 139, 219].

§ 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time [218].

§ 27. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien [98, 219].

§ 28. Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise [99, 100].

§ 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party [102, 104, 220].

ARTICLE III.

NEGOTIATION.

§ 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof [162]. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery [162, 167].

§ 31. The indorsement must be written on the instrument itself or upon a paper attached thereto [165]. The signature of the indorser, without additional words, is a sufficient indorsement [168].

§ 32. The indorsement must be an indorsement of the entire instrument [167]. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsee severally, does not operate as a negotiation of the instrument [167]. But where the instrument has been paid in part, it may be indorsed as to the residue [168].

§ 33. An indorsement may be either special [169] or in blank [172]; and it may also be either restrictive [172] or qualified [176], or conditional [177].

§ 34. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable [169]; and the indorsement of such indorsee is necessary to the further negotiation of the instrument [170]. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery [172].

§ 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement [171].

§ 36. An indorsement is restrictive, which either:—

1. Prohibits the further negotiation of the instrument [173]; or
2. Constitutes the indorsee the agent of the indorser [173]; or

3. Vests the title in the indorsee in trust for or to the use of some other person [174].

But the mere absence of words implying power to negotiate does not make an indorsement restrictive [173].

§ 37. A restrictive indorsement confers upon the indorsee the right:—

1. To receive payment of the instrument [174];
2. To bring any action thereon that the indorser could bring [175];
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so [175].

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement [175].

§ 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument [176]. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import [176]. Such an indorsement does not impair the negotiable character of the instrument [176].

§ 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not [177]. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally [178].

§ 40. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery [170], but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement [170, 209].

§ 41. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others [179].

§ 42. Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of

which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer [181].

§ 43. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorsee the instrument as therein described, adding, if he think fit, his proper signature [168].

§ 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability [181].

§ 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue [183, 215].

§ 46. Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated [184].

§ 47. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise [186].

§ 48. The holder may at any time strike out any indorsement which is not necessary to his title [185]. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument [186].

§ 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferror had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferror [162]. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made [163, 216].

§ 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable [187].

ARTICLE IV.

RIGHTS OF HOLDER.

§ 51. The holder of a negotiable instrument may sue thereon in his own name [210]; and payment to him in due course discharges the instrument [160, 321].

§ 52. A holder in due course is a holder who has taken the instrument under the following conditions:—

1. That it is complete and regular upon its face [213];
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact [214];
3. That he took it in good faith [216] and for value [217].
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it [222].

§ 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course [100, 215].

§ 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him [223].

§ 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud [223].

§ 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith [225].

§ 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon [212, 238].

§ 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable [240]. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter [241].

§ 59. Every holder is deemed *prima facie* to be a holder in due course [228]; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course [229]. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title [230].

ARTICLE V.

LIABILITIES OF PARTIES.

§ 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his capacity to endorse [189, 190].

§ 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder [190, 191].

§ 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance [192, 194]; and admits:—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument [192, 193, 194, 310]; and
2. The existence of the payee and his then capacity to indorse [193, 195].

§ 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity [111, 196].

§ 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:—

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties [199];
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer [199];
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee [199].

§ 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:—

1. That the instrument is genuine and in all respects what it purports to be [202, 309];
2. That he has a good title to it [202];
3. That all prior parties had capacity to contract [202];
4. That he has no knowledge of any fact which would impair the validity of the instrument to render it valueless [203].

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee [203].

The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities other than bills and notes [202].

§ 66. Every indorser who indorses without qualification [203] warrants to all subsequent holders, in due course [204] :—

1. The matters and things mentioned in subdivisions one, two and three of the next preceding section [205] ; and
2. That the instrument is at the time of his indorsement valid and subsisting [206].

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it [206].

§ 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser [197].

§ 68. As respects one another, indorsers are liable prima facie in the order in which they indorse [207] ; but evidence is admissible to show that as between or among themselves they have agreed otherwise [208]. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally [199, 209].

§ 69. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent [210].

ARTICLE VI.

PRESENTMENT FOR PAYMENT.

§ 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument [243] ; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part [244]. But except as herein provided, presentment for payment is necessary in order to charge the drawer and indorsers [245].

§ 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due [254]. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that, in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof [255].

§ 72. Presentment for payment, to be sufficient, must be made:—

1. By the holder, or by some person authorized to receive payment on his behalf [246];
2. At a reasonable hour on a business day [250];
3. At a proper place as herein defined [261];
4. To the person primarily liable on the instrument, or if he is absent or inaccessible to any person found at the place where the presentment is made [247].

§ 73. Presentment for payment is made at the proper place:—

1. Where a place of payment is specified in the instrument and it is there presented [261];
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented [262];
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment [86, 262];
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence [263].

§ 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it [263, 329].

§ 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient [250].

§ 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found [248].

§ 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm [248].

§ 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all [248].

§ 79. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument [245].

§ 80. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented [246].

§ 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence [259]. When the cause of delay ceases to operate, presentment must be made with reasonable diligence [260].

§ 82. Presentment for payment is dispensed with:—

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made [249, 264];
2. Where the drawee is a fictitious person [265];
3. By waiver of presentment, express or implied [265].

§ 83. The instrument is dishonored by nonpayment when:—

1. It is duly presented for payment and payment is refused or cannot be obtained [266]; or
2. Presentment is excused and the instrument is overdue and unpaid [266].

§ 84. Subject to the provisions of this act, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder [267].

§ 85. Every negotiable instrument is payable at the time fixed therein without grace [253]. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day [252]. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday [15, 123, 252].

§ 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment [254].

§ 87. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon [325].

§ 88. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective [322].

ARTICLE VII.

NOTICE OF DISHONOR.

§ 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged [281].

§ 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given [285, 286].

§ 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not [286].

§ 92. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given [287].

§ 93. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given [288].

§ 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal [287]. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder [299].

§ 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication [292]. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby [293].

§ 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by nonacceptance or nonpayment [292]. It may in all cases be given by delivering it personally or through the mails [294].

§ 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf [289].

§ 98. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found [289]. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased. [290].

§ 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution [290].

§ 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others [290].

§ 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustees or assignee [291].

§ 102. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act [296].

§ 103. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:—

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following [297];
2. If given at his residence, it must be given before the usual hours of rest on the day following [297];
3. If sent by mail, it must be deposited in the post office in time to reach him in the usual course on the day following [297].

§ 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:—

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter [298];
2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision [298].

§ 105. Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails [295].

§ 106. Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department [295].

§ 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor [298].

§ 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address [300]; but if he has not given such address, then the notice must be sent as follows:—

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters [300]; or
2. If he live in one place, and have his place of business in another, notice may be sent to either place [301]; or
3. If he is sojourning in another place, notice may be sent to the place where he is sojourning [301].

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section [300].

§ 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice and the waiver may be express or implied [303, 304].

§ 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only [305].

§ 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor [266, 276, 304].

§ 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged [302].

§ 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence [305]. When the cause of delay ceases to operate, notice must be given with reasonable diligence [305].

§ 114. Notice of dishonor is not required to be given to the drawer in either of the following cases:—

1. When the drawer and drawee are the same person [283];
2. When the drawee is a fictitious person or a person not having capacity to contract [283];
3. When the drawer is the person to whom the instrument is presented for payment [283];
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument [283];
5. Where the drawer has countermanded payment [283].

§ 115. Notice of dishonor is not required to be given to an indorser in either of the following cases:—

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument [284];
2. Where the indorser is the person to whom the instrument is presented for payment [284];
3. Where the instrument was made or accepted for his accommodation [285].

§ 116. Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary, unless in the meantime the instrument has been accepted [303].

§ 117. An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission [306].

§ 118. Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment, as the case may be; but protest is not required except in the case of foreign bills of exchange [269].

ARTICLE VIII.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

§ 119. A negotiable instrument is discharged:—

1. By payment in due course by or on behalf of the principal debtor [320];

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation [321];
3. By the intentional cancellation thereof by the holder [324];
4. By any other act which will discharge a simple contract for the payment of money [324];
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right [324].

§ 120. A person secondarily liable on the instrument is discharged:—

1. By an act which discharges the instrument [333];
2. By the intentional cancellation of his signature by the holder [333];
3. By the discharge of a prior party [333];
4. By a valid tender of payment made by a prior party [334];
5. By a release of the principal debtor unless the holder's right of recourse against the party secondarily liable is expressly reserved [334];
6. By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved [334].

§ 121. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties [338], and he may strike out his own and all subsequent indorsements, and again negotiate the instrument [339], except:—

1. Where it is payable to the order of a third person, and has been paid by the drawer [338]; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated [338].

§ 122. The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the

rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon [337].

§ 123. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority [324].

§ 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereto, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers [142, 311].

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor [312].

§ 125. Any alteration which changes [142]:—

1. The date [315];
2. The sum payable, either for principal or interest [315];
3. The time or place of payment [315];
4. The number or the relations of the parties [315];
5. The medium of currency in which payment is to be made [316];

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration [316].

TITLE II.

BILLS OF EXCHANGE.

ARTICLE I.

FORM AND INTERPRETATION.

§ 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving

it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer [11, 138].

§ 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same [114, 130, 244].

§ 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession [12, 84].

§ 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill [13].

§ 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note [110].

§ 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit [128, 129, 267].

ARTICLE II.

ACCEPTANCE.

§ 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer [132]. The acceptance must be in writing and signed by the drawee [133, 149]. It must not express that the drawee will perform his promise by any other means than the payment of money [11, 138].

§ 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and, if such request is refused, may treat the bill as dishonored [135].

§ 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value [135].

§ 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value [151, 152].

§ 136. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation [141].

§ 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same [135].

§ 138. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment [147]. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment [147].

§ 139. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer [142]. A qualified acceptance in express terms varies the effect of the bill as drawn [143].

§ 140. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere [145].

§ 141. An acceptance is qualified which is:—

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated [144];

2. Partial, that is to say, an acceptance to pay part of the amount for which the bill is drawn [144];
3. Local, that is to say, an acceptance to pay only at a particular place [145];
4. Qualified as to time [145];
5. The acceptance of some one or more of the drawees, but not of all [145].

§ 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance [146]. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto [146]. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto [146].

ARTICLE III.

PRESENTMENT FOR ACCEPTANCE.

§ 143. Presentment for acceptance must be made:—

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument [118]; or
2. Where the bill expressly stipulates that it shall be presented for acceptance [118]; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee [118, 124].

In no other case is presentment for acceptance necessary in order to render any party to the bill liable [118].

§ 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged [121].

§ 145. Presentment for acceptance must be made by or on behalf of the holder [124] at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf [122, 125]; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only [126];
2. Where the drawee is dead, presentment may be made to his personal representative [126];
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee [126].

§ 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act [122]. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon, on that day [123].

§ 147. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers [123].

§ 148. Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases:—

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill [119];
2. Where, after the exercise of reasonable diligence, presentment cannot be made [119];

3. Where, although presentment has been irregular, acceptance has been refused on some other ground [119].

§ 149. A bill is dishonored by nonacceptance:—

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained [127]; or
2. When presentment for acceptance is excused and the bill is not accepted [127].

§ 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers [128].

§ 151. When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary [128].

ARTICLE IV.

PROTEST.

§ 152. Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment [269]. If it is not so protested, the drawer and indorsers are discharged [269]. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary [128].

§ 153. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it [271], and must specify:—

1. The time and place of presentment [271];
2. The fact that presentment was made and the manner thereof [271];
3. The cause or reason for protesting the bill [271];

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found [271].

§ 154. Protest may be made by:—

1. A notary public [272]; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses [273].

§ 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided [273]. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting [274].

§ 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by nonacceptance, it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary [275].

§ 157. A bill which has been protested for nonacceptance may be subsequently protested for nonpayment [270].

§ 158. Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers [274].

§ 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor [277]. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence [278].

§ 160. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof [276].

ARTICLE V.

ACCEPTANCE FOR HONOR.

§ 161. Where a bill of exchange has been protested for dishonor by nonacceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party [153].

§ 162. An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor [154].

§ 163. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer [154].

§ 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted [155].

§ 165. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him [155].

§ 166. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor [156].

§ 167. Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need [275].

§ 168. Presentment for payment to the acceptor for honor must be made as follows:—

1. If it is to be presented in the place where the protest for nonpayment was made, it must be presented not later than the day following its maturity [260];
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four [260].

§ 169. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need [260].

§ 170. When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him [270].

ARTICLE VI.

PAYMENT FOR HONOR.

§ 171. Where a bill has been protested for nonpayment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn [330].

§ 172. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it [331].

§ 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays [331].

§ 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference [331].

§ 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both

the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter [331].

§ 176. Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment [332].

§ 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest [332].

ARTICLE VII.

BILLS IN A SET.

§ 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill [14].

§ 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill [184]. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him [184].

§ 180. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills [201].

§ 181. The acceptance may be written on any part and it must be written on one part only [147]. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill [147].

§ 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon [329].

§ 183. Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged [328].

TITLE III.

PROMISSORY NOTES AND CHECKS.

ARTICLE I.

§ 184. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him [5, 10, 71, 73].

§ 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check [14, 15].

§ 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay [257].

§ 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance [148].

§ 188. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon [150].

§ 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check [115, 148, 244].

TITLE IV.

GENERAL PROVISIONS.

ARTICLE I.

§ 190. This act shall be known as the Negotiable Instruments Law [3].

§ 191. In this act unless the context otherwise requires:—

“Acceptance” means an acceptance completed by delivery or notification [16, 132].

“Action” includes counterclaim and set-off [16].

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not [16, 326].

“Bearer” means the person in possession of a bill or note which is payable to bearer [16].

“Bill” means bill of exchange, and “note” means negotiable promissory note [16].

“Delivery” means transfer of possession, actual or constructive, from one person to another [4, 16, 35, 164].

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof [16, 160, 162].

“Indorsement” means an indorsement completed by delivery [16, 167].

“Instrument” means negotiable instrument [16].

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder [16, 20].

“Person” includes a body of persons, whether incorporated or not [16].

“Value” means valuable consideration [16].

“Written” includes printed, and “writing” includes print [16, 18].

§ 192. The person “primarily” liable on an instrument is the person who by the terms of the instrument is absolutely required to pay same. All other parties are “secondarily” liable [244, 336].

§ 193. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case [26, 121, 146, 215, 256, 257].

§ 194. Where the day, or the last day, for doing any act herein required or permitted to be done, falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day [252].

§ 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof [4].

§ 196. In any case not provided for in this act, the rules of the law merchant shall govern [7, 112, 113].

§ 197. Of the laws enumerated in the schedules hereto annexed, that portion specified in the last column is repealed [See Appendix "D"].

§ 198. This chapter shall take effect on—————[See Appendix "C"].

APPENDIX B.

TABLE TO FURTHER FACILITATE THE FINDING OF PARALLEL SECTIONS OF THE NEGOTIABLE INSTRUMENTS LAWS.

The section numbers in the Original Draft of the Negotiable Instruments Law are the numbers used in the law as adopted in Alabama, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia, and Wyoming.

In the states of Arizona, Illinois, Kansas, Maryland, Michigan, Nebraska, New York, Ohio, Rhode Island and Wisconsin, the section numbers of the law as adopted have been changed from that as found in the Original Draft.

The table below is for the purpose of facilitating the finding of the corresponding sections either in the Original Draft, and hence in the states which have adopted the section numbers of the Original Draft, or in those other states where the numbers have been changed. Having the proper section in the Original Draft the table here given renders it easy to find the parallel sections in the other states, and vice versa. Also by referring from the section number of the Original Draft to the corresponding section number in the Act as given in Appendix "A," the place where that section is treated in this work may be found.

| Original Draft | Ariz. | Ill. | Kan. | Md. | Mich. | Neb. | N. Y. | Ohio | R. I. | Wis. |
|-------------------|-------|------|------|------|-------|------|-------|--------|-------|----------|
| § 1 | §3304 | § 1 | § 8 | § 20 | § 3 | § 1 | § 20 | § 3171 | § 9 | § 1675-1 |
| 2 | 3305 | 2 | 9 | 21 | 4 | 2 | 21 | 3171a | 10 | 1675-2 |
| 3 | 3306 | 3 | 10 | 22 | 5 | 3 | 22 | 3171b | 11 | 1675-3 |
| 4 | 3307 | 4 | 11 | 23 | 6 | 4 | 23 | 3171c | 12 | 1675-4 |
| 5 | 3308 | 5 | 12 | 24 | 7 | 5 | 24 | 3171d | 13 | 1675-5 |
| 6 | 3309 | 6 | 13 | 25 | 8 | 6 | 25 | 3171e | 14 | 1675-6 |
| 7 | 351c | 7 | 14 | 26 | 9 | 7 | 26 | 3171f | 15 | 1675-7 |
| 8 | 3311 | 8 | 15 | 27 | 10 | 8 | 27 | 3171g | 16 | 1675-8 |
| 9 | 3312 | 9 | 16 | 28 | 11 | 9 | 28 | 3171h | 17 | 1675-9 |
| 10 | 3313 | 10 | 17 | 29 | 12 | 10 | 29 | 3171i | 17 | 1675-10 |
| 11 | 3314 | 11 | 18 | 30 | 13 | 11 | 30 | 3171j | 19 | 1675-11 |
| 12 | 3315 | 12 | 19 | 31 | 14 | 12 | 31 | 3171k | 20 | 1675-12 |
| 13 | 3316 | 13 | 20 | 32 | 15 | 13 | 32 | 3171l | 21 | 1675-13 |
| 14 | 3317 | 14 | 21 | 33 | 16 | 14 | 33 | 3171m | 22 | 1675-14 |
| 15 | 3318 | 15 | 22 | 34 | 17 | 15 | 34 | 3171n | 23 | 1675-15 |
| 16 | 3319 | 16 | 23 | 35 | 18 | 16 | 35 | 3171o | 24 | 1675-16 |
| 17 | 3320 | 17 | 24 | 36 | 19 | 17 | 36 | 3171p | 25 | 1675-17 |
| 18 | 3321 | 18 | 25 | 37 | 20 | 18 | 37 | 3171q | 26 | 1675-18 |
| 19 | 3322 | 19 | 26 | 38 | 21 | 19 | 38 | 3171r | 27 | 1675-19 |
| 20 | 3323 | 20 | 27 | 39 | 22 | 20 | 39 | 3171s | 28 | 1675-20 |
| 21 | 3324 | 21 | 28 | 40 | 23 | 21 | 40 | 3171t | 29 | 1675-21 |
| 22 | 3325 | 22 | 29 | 41 | 24 | 22 | 41 | 3171u | 30 | 1675-22 |
| 23 | 3326 | 23 | 30 | 42 | 25 | 23 | 42 | 3171v | 31 | 1675-23 |
| 24 | 3327 | 24 | 31 | 43 | 26 | 24 | 50 | 3171w | 32 | 1675-24 |
| 25 | 3328 | 25 | 32 | 44 | 27 | 25 | 51 | 3171x | 33 | 1675-25 |
| 26 | 3329 | 26 | 33 | 45 | 28 | 26 | 52 | 3171y | 34 | 1675-26 |
| 27 | 3330 | 27 | 34 | 46 | 29 | 27 | 53 | 3171z | 35 | 1675-27 |
| 28 | 3331 | 28 | 35 | 47 | 30 | 28 | 54 | 3172 | 36 | 1675-28 |
| 29 | 3332 | 29 | 36 | 48 | 31 | 29 | 55 | 3172a | 37 | 1675-29 |
| 30 | 3333 | 30 | 37 | 49 | 32 | 30 | 60 | 3172b | 38 | 1676 |
| 31 | 3334 | 31 | 38 | 50 | 33 | 31 | 61 | 3172c | 39 | 1676-1 |
| 32 | 3335 | 32 | 39 | 51 | 34 | 32 | 62 | 3172d | 40 | 1676-2 |
| 33 | 3336 | 33 | 40 | 52 | 35 | 33 | 63 | 3172e | 41 | 1676-3 |
| 34 | 3337 | 34 | 41 | 53 | 36 | 34 | 64 | 3172f | 42 | 1676-4 |
| 35 | 3338 | 35 | 42 | 54 | 37 | 35 | 65 | 3172g | 43 | 1676-5 |
| 36 | 3339 | 36 | 43 | 55 | 38 | 36 | 66 | 3172h | 44 | 1676-6 |
| 37 | 3340 | 37 | 44 | 56 | 39 | 37 | 67 | 3172i | 45 | 1676-7 |
| 38 | 3341 | 38 | 45 | 57 | 40 | 38 | 68 | 3172j | 46 | 1676-8 |
| 39 | 3342 | 39 | 46 | 58 | 41 | 39 | 69 | 3172k | 47 | 1676-9 |
| 40 | 3343 | 40 | 47 | 59 | 42 | 40 | 70 | 3172l | 48 | 1676-10 |
| 41 | 3344 | 41 | 48 | 60 | 43 | 41 | 71 | 3172m | 49 | 1676-11 |
| 42 | 3345 | 42 | 49 | 61 | 44 | 42 | 72 | 3172n | 50 | 1676-12 |
| 43 | 3346 | 43 | 50 | 62 | 45 | 43 | 73 | 3172o | 51 | 1676-13 |
| 44 | 3347 | 44 | 51 | 63 | 46 | 44 | 74 | 3172p | 52 | 1676-14 |
| 45 | 3348 | 45 | 52 | 64 | 47 | 45 | 75 | 3172q | 53 | 1676-15 |
| 46 | 3349 | 46 | 53 | 65 | 48 | 46 | 76 | 3172r | 54 | 1676-16 |
| 47 | 3350 | 47 | 54 | 66 | 49 | 47 | 77 | 3172s | 55 | 1676-17 |
| 48 | 3351 | 48 | 55 | 67 | 50 | 48 | 78 | 3172t | 56 | 1676-18 |
| 49 | 3352 | 49 | 56 | 68 | 51 | 49 | 79 | 3172u | 57 | 1676-19 |
| 50 | 3353 | 50 | 57 | 69 | 52 | 50 | 80 | 3172v | 58 | 1676-20 |
| 51 | 3354 | 51 | 58 | 70 | 53 | 51 | 90 | 3172w | 59 | 1676-21 |
| 52 | 3355 | 52 | 59 | 71 | 54 | 52 | 91 | 3172x | 60 | 1676-22 |
| 53 | 3356 | 53 | 60 | 72 | 55 | 53 | 92 | 3172y | 61 | 1676-23 |
| 54 | 3357 | 54 | 61 | 73 | 56 | 54 | 93 | 3172z | 62 | 1676-24 |
| 55 | 3358 | 55 | 62 | 74 | 57 | 55 | 94 | 3173 | 63 | 1676-25 |
| 56 | 3359 | 56 | 63 | 75 | 58 | 56 | 95 | 3173a | 64 | 1676-26 |
| 57 | 3360 | 57 | 64 | 76 | 59 | 57 | 96 | 3173b | 65 | 1676-27 |
| 58 | 3361 | 58 | 65 | 77 | 60 | 58 | 97 | 3173c | 66 | 1676-28 |
| 59 | 3362 | 59 | 66 | 78 | 61 | 59 | 98 | 3173d | 67 | 1676-29 |
| 60 | 3363 | 60 | 67 | 79 | 62 | 60 | 110 | 3173e | 68 | 1677 |
| 61 | 3364 | 61 | 68 | 80 | 63 | 61 | 111 | 3173f | 69 | 1677-1 |
| 62 | 3365 | 62 | 69 | 81 | 64 | 62 | 112 | 3173g | 70 | 1677-2 |
| 63 | 3366 | 63 | 70 | 82 | 65 | 63 | 113 | 3173h | 71 | 1677-3 |
| 64 | 3367 | 64 | 71 | 83 | 66 | 64 | 114 | 3173i | 72 | 1677-4 |
| 65 | 3368 | 65 | 72 | 84 | 67 | 65 | 115 | 3173j | 73 | 1677-5 |
| 66 | 3369 | 66 | 73 | 85 | 68 | 66 | 116 | 3173k | 74 | 1677-6 |
| 67 | 3370 | 67 | 74 | 86 | 69 | 67 | 117 | 3173l | 75 | 1677-7 |
| 68 | 3371 | 68 | 75 | 87 | 70 | 68 | 118 | 3173m | 76 | 1677-8 |
| 69 | 3372 | 69 | 76 | 88 | 71 | 69 | 119 | 3173n | 77 | 1677-9 |

APPENDIX.

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| Original Draft | Ariz. | Ill. | Kan. | Md. | Mich. | Neb. | N. Y. | Ohio | R. I. | Wis. |
|-------------------|---------|-------|-------|-------|-------|-------|--------|----------|-------|---------|
| \$ 70 | \$ 3373 | \$ 70 | \$ 77 | \$ 89 | \$ 72 | \$ 70 | \$ 130 | \$ 3173o | \$ 78 | \$ 1678 |
| 71 | 3374 | 71 | 78 | 90 | 73 | 71 | 131 | 3173p | 79 | 1678-1 |
| 72 | 3375 | 72 | 79 | 91 | 74 | 72 | 132 | 3173q | 80 | 1678-2 |
| 73 | 3376 | 73 | 80 | 92 | 75 | 73 | 133 | 3173r | 81 | 1678-3 |
| 74 | 3377 | 74 | 81 | 93 | 76 | 74 | 134 | 3173s | 82 | 1678-4 |
| 75 | 3378 | 75 | 82 | 94 | 77 | 75 | 135 | 3173t | 83 | 1678-5 |
| 76 | 3379 | 76 | 83 | 95 | 78 | 76 | 136 | 3173u | 84 | 1678-6 |
| 77 | 3380 | 77 | 84 | 96 | 79 | 77 | 137 | 3173v | 85 | 1678-7 |
| 78 | 3381 | 78 | 85 | 97 | 80 | 78 | 138 | 3173w | 86 | 1678-8 |
| 79 | 3382 | 79 | 86 | 98 | 81 | 79 | 139 | 3173x | 87 | 1678-9 |
| 80 | 3383 | 80 | 87 | 99 | 82 | 80 | 140 | 3173y | 88 | 1678-10 |
| 81 | 3384 | 81 | 88 | 100 | 83 | 81 | 141 | 3173z | 89 | 1678-11 |
| 82 | 3385 | 82 | 89 | 101 | 84 | 82 | 142 | 3174 | 90 | 1678-12 |
| 83 | 3386 | 83 | 90 | 102 | 85 | 83 | 143 | 3174a | 91 | 1678-13 |
| 84 | 3387 | 84 | 91 | 103 | 86 | 84 | 144 | 3174b | 92 | 1678-14 |
| 85 | 3388 | 85 | 92 | 104 | 87 | 85 | 145 | 3174c | 93 | 1678-15 |
| 86 | 3389 | 86 | 93 | 105 | 88 | 86 | 146 | 3174d | 94 | 1678-16 |
| 87 | 3390 | 87 | 94 | 106 | 89 | 87 | 147 | 3174e | 95 | 1678-17 |
| 88 | 3391 | 88 | 95 | 107 | 90 | 88 | 148 | 3174f | 96 | 1678-18 |
| 89 | 3392 | 89 | 96 | 108 | 91 | 89 | 149 | 3174g | 97 | 1678-19 |
| 90 | 3393 | 90 | 97 | 109 | 92 | 90 | 150 | 3174h | 98 | 1678-20 |
| 91 | 3394 | 91 | 98 | 110 | 93 | 91 | 151 | 3174i | 99 | 1678-21 |
| 92 | 3395 | 92 | 99 | 111 | 94 | 92 | 152 | 3174j | 100 | 1678-22 |
| 93 | 3396 | 93 | 100 | 112 | 95 | 93 | 153 | 3174k | 101 | 1678-23 |
| 94 | 3397 | 94 | 101 | 113 | 96 | 94 | 154 | 3174l | 102 | 1678-24 |
| 95 | 3398 | 95 | 102 | 114 | 97 | 95 | 155 | 3174m | 103 | 1678-25 |
| 96 | 3399 | 96 | 103 | 115 | 98 | 96 | 156 | 3174n | 104 | 1678-26 |
| 97 | 3400 | 97 | 104 | 116 | 99 | 97 | 157 | 3174o | 105 | 1678-27 |
| 98 | 3401 | 98 | 105 | 117 | 100 | 98 | 158 | 3174p | 106 | 1678-28 |
| 99 | 3402 | 99 | 106 | 118 | 101 | 99 | 159 | 3174q | 107 | 1678-29 |
| 100 | 3403 | 100 | 107 | 119 | 102 | 100 | 160 | 3174r | 108 | 1678-30 |
| 101 | 3404 | 101 | 108 | 120 | 103 | 101 | 161 | 3174s | 109 | 1678-31 |
| 102 | 3405 | 102 | 109 | 121 | 104 | 102 | 162 | 3174t | 110 | 1678-32 |
| 103 | 3406 | 103 | 110 | 122 | 105 | 103 | 163 | 3174u | 111 | 1678-33 |
| 104 | 3407 | 104 | 111 | 123 | 106 | 104 | 164 | 3174v | 112 | 1678-34 |
| 105 | 3408 | 105 | 112 | 124 | 107 | 105 | 165 | 3174w | 113 | 1678-35 |
| 106 | 3409 | 106 | 113 | 125 | 108 | 106 | 166 | 3174x | 114 | 1678-36 |
| 107 | 3410 | 107 | 114 | 126 | 109 | 107 | 167 | 3174y | 115 | 1678-37 |
| 108 | 3411 | 108 | 115 | 127 | 110 | 108 | 168 | 3174z | 116 | 1678-38 |
| 109 | 3412 | 109 | 116 | 128 | 111 | 109 | 169 | 3175 | 117 | 1678-39 |
| 110 | 3413 | 110 | 117 | 129 | 112 | 110 | 170 | 3175a | 118 | 1678-40 |
| 111 | 3414 | 111 | 118 | 130 | 113 | 111 | 171 | 3175b | 119 | 1678-41 |
| 112 | 3415 | 112 | 119 | 131 | 114 | 112 | 172 | 3175c | 120 | 1678-42 |
| 113 | 3416 | 113 | 120 | 132 | 115 | 113 | 173 | 3175d | 121 | 1678-43 |
| 114 | 3417 | 114 | 121 | 133 | 116 | 114 | 174 | 3175e | 122 | 1678-44 |
| 115 | 3418 | 115 | 122 | 134 | 117 | 115 | 175 | 3175f | 123 | 1678-45 |
| 116 | 3419 | 116 | 123 | 135 | 118 | 116 | 176 | 3175g | 124 | 1678-46 |
| 117 | 3420 | 117 | 124 | 136 | 119 | 117 | 177 | 3175h | 125 | 1678-47 |
| 118 | 3421 | 118 | 125 | 137 | 120 | 118 | 178 | 3175i | 126 | 1678-48 |
| 119 | 3422 | 119 | 126 | 138 | 121 | 119 | 179 | 3175j | 127 | 1679 |
| 120 | 3423 | 120 | 127 | 139 | 122 | 120 | 180 | 3175k | 128 | 1679-1 |
| 121 | 3424 | 121 | 128 | 140 | 123 | 121 | 181 | 3175l | 129 | 1679-2 |
| 122 | 3425 | 122 | 129 | 141 | 124 | 122 | 182 | 3175m | 130 | 1679-3 |
| 123 | 3426 | 123 | 130 | 142 | 125 | 123 | 183 | 3175n | 131 | 1679-4 |
| 124 | 3427 | 124 | 131 | 143 | 126 | 124 | 184 | 3175o | 132 | 1679-5 |
| 125 | 3428 | 125 | 132 | 144 | 127 | 125 | 185 | 3175p | 133 | 1679-6 |
| 126 | 3429 | 126 | 133 | 145 | 128 | 126 | 186 | 3175q | 134 | 1680 |
| 127 | 3430 | 127 | 134 | 146 | 129 | 127 | 187 | 3175r | 135 | 1680-A |
| 128 | 3431 | 128 | 135 | 147 | 130 | 128 | 188 | 3175s | 136 | 1680-B |
| 129 | 3432 | 129 | 136 | 148 | 131 | 129 | 189 | 3175t | 137 | 1680-C |
| 130 | 3433 | 130 | 137 | 149 | 132 | 130 | 190 | 3175u | 138 | 1680-D |
| 131 | 3434 | 131 | 138 | 150 | 133 | 131 | 191 | 3175v | 139 | 1680-E |
| 132 | 3435 | 132 | 139 | 151 | 134 | 132 | 192 | 3175w | 140 | 1680-F |
| 133 | 3436 | 133 | 140 | 152 | 135 | 133 | 193 | 3175x | 141 | 1680-G |
| 134 | 3437 | 134 | 141 | 153 | 136 | 134 | 194 | 3175y | 142 | 1680-H |
| 135 | 3438 | 135 | 142 | 154 | 137 | 135 | 195 | 3175z | 143 | 1680-I |
| 136 | 3439 | 136 | 143 | 155 | 138 | 136 | 196 | 3176 | 144 | 1680-J |
| 137 | 3440 | 137 | 144 | 156 | 139 | 137 | 197 | 3176a | 145 | 1680-K |
| 138 | 3441 | 138 | 145 | 157 | 140 | 138 | 198 | 3176b | 146 | 1680-L |

| Original Draft | Ariz | Ill | Kan. | Md. | Mich. | Neb. | N. Y | Ohio | R. I. | Wis. |
|-------------------|---------|--------|--------|--------|--------|--------|--------|----------|--------|-----------|
| \$ 139 | \$ 3442 | \$ 138 | \$ 146 | \$ 158 | \$ 141 | \$ 138 | \$ 226 | \$ 3176c | \$ 147 | \$ 1680-M |
| 140 | 3443 | 139 | 147 | 159 | 142 | 139 | 227 | 3176d | 148 | 1680-N |
| 141 | 3444 | 140 | 148 | 160 | 143 | 140 | 228 | 3176e | 149 | 1680-O |
| 142 | 3445 | 141 | 149 | 161 | 144 | 141 | 229 | 3176f | 150 | 1680-P |
| 143 | 3446 | 142 | 150 | 162 | 145 | 142 | 240 | 3176g | 151 | 1681 |
| 144 | 3447 | 143 | 151 | 163 | 146 | 143 | 241 | 3176h | 152 | 1681-1 |
| 145 | 3448 | 144 | 152 | 164 | 147 | 144 | 242 | 3176i | 153 | 1681-2 |
| 146 | 3449 | 145 | 153 | 165 | 148 | 145 | 243 | 3176j | 154 | 1681-3 |
| 147 | 3450 | 146 | 154 | 166 | 149 | 146 | 244 | 3176k | 155 | 1681-4 |
| 148 | 3451 | 147 | 155 | 167 | 150 | 147 | 245 | 3176l | 156 | 1681-5 |
| 149 | 3452 | 148 | 156 | 168 | 151 | 148 | 246 | 3176m | 157 | 1681-6 |
| 150 | 3453 | 149 | 157 | 169 | 152 | 149 | 247 | 3176n | 158 | 1681-7 |
| 151 | 3454 | 150 | 158 | 170 | 153 | 150 | 248 | 3176o | 159 | 1681-8 |
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| 193 | 3489 | 192 | 4 | 16 | 2 | 191 | 4 | 3178b | 4 | 1675 |
| 194 | 3490 | 193 | 5 | 17 | 2 | 192 | 5 | 3178c | | 1675 |
| 195 | | 194 | 6 | 18 | 2 | 193 | 6 | 3178d | 6 | 1675 |
| 196 | 3491 | 195 | 7 | 19 | 2 | 194 | 7 | 3178e | 7 | 1675 |

APPENDIX C.

WHERE THE VARIOUS LAWS ARE FOUND AND WHEN THEY TAKE EFFECT.

- Alabama,—Code of 1907, page 1063. In effect January 1, 1908.
Arizona,—R. S. 1901, Title XLIX. In effect September 1, 1901.
Colorado,—Laws of 1897, ch. 64. Approved April 20th, 1897.
Connecticut,—Laws of 1897, ch. 74. Approved April 5, 1897.
District of Columbia,—Laws of 1899 (U. S. Stats.) ch. 47. In effect April 3, 1899.
Florida,—Laws of 1897, ch. 4524. Approved June 1, 1897.
Hawaii,—Laws of 1907, Act 89. In effect April 20, 1907.
Idaho,—Laws of 1903, page 380. In effect March 10, 1903.
Illinois,—Laws of 1907, page 403. Approved June 5, 1907.
Iowa,—Laws 1902, ch. 130. Approved April 12, 1902.
Kansas,—Laws of 1905, ch. 310. In effect June 8, 1905.
Kentucky,—Acts 1904, ch. 102. Approved March 24, 1904.
Louisiana,—Laws of 1904, Act 64. Approved June 29, 1904.
Maryland,—Laws of 1898, ch. 119. Approved March 29, 1898.
Massachusetts,—Laws of 1898, ch. 533. In effect January 1, 1899.
Massachusetts,—Laws of 1899, ch. 130. In effect March 6, 1899.
Michigan,—Public Acts 1905, page 389. Approved June 16, 1905.
Missouri,—Laws of 1905, page 243. Approved April 10, 1905.
Montana,—Laws of 1903, ch. 121. In effect March 7, 1903.
Nebraska,—Laws of 1905, ch. 83. In effect August 1, 1905.
Nevada,—Laws of 1907, ch. 62. In effect May 1, 1907.
New Hampshire,—Laws of 1909, ch. 123. Approved January 1, 1910.
New Jersey,—Laws of 1902, ch. 184. Approved April 4, 1902.
New Mexico,—Laws of 1907, ch. 83. Approved March 21, 1907.

- New York,—Laws of 1897, ch. 612. Became a law May 19, 1897.
New York,—Laws of 1898, ch. 336. Became a law April 20, 1898.
North Carolina,—Laws of 1899, ch. 733. In effect March 8, 1899.
North Dakota,—Laws of 1899, ch. 113. Approved March 7, 1899.
Oklahoma,—Laws of 1909, ch. 24. Approved March 20, 1909.
Ohio,—Laws of 1902, page 162. In effect January 1, 1903.
Oregon,—Laws of 1899, page 18. Approved February 16, 1899.
Pennsylvania,—Laws of 1901, page 194. In effect September 2, 1901.
Rhode Island,—Laws of 1899, ch. 674. In effect July 1, 1899.
Tennessee,—Laws of 1899, ch. 94. In effect May 16, 1899.
Utah,—Laws of 1899, ch. 83. In effect July 1, 1899.
Virginia,—Laws of 1897-8, ch. 866. Approved March 3, 1898.
Washington,—Laws of 1899, ch. 149. In effect March 22, 1899.
West Virginia,—Acts of 1907, ch. 81. In effect January 1, 1908.
Wisconsin,—Laws of 1899, ch. 356. In effect May 15, 1899.
Wyoming,—Laws of 1905, ch. 43. In effect February 15, 1905.

APPENDIX D.

Schedule of Statutes Repealed by the Various Negotiable Instru- ments Laws.

ALABAMA, statute contains no statement of express repeals.

ARIZONA, statute contains no statement of express repeals.

COLORADO, Laws 1897, c. 64, repeals (§ 197) sections 101 to 115 inclusive, and sections 1630, 2463, 2464 and 2465 of the General Statutes of 1883, and all other inconsistent acts or parts of acts.

CONNECTICUT, Laws 1897, c. LXXIV, repeals (§ 197) sections 1858, 1859, 1860 and 1863 of the General Statutes.

DISTRICT OF COLUMBIA, U. S. Statutes at Large 1897-99, c. 47, repeals (§ 190) all inconsistent laws.

FLORIDA, Laws 1897, c. 4524, No. 10, repeals (§ 190) all conflicting laws or parts of laws.

IDAHO, section 197 repeals of the laws enumerated in the schedules thereto annexed that portion specified in the last column (schedule is omitted in the laws as published).

ILLINOIS, section 196 repeals section 1268 of an act entitled "An Act to Revise the Laws in Relation to Promissory Notes, Bonds, Due Bills, and other Instruments in Writing." Approved March 18, 1874. In force July 1st, 1874, and sections 10 and 11 of an act entitled "An Act to Provide for the Appointment, Qualification and Duties of Notary Publics and Certifying their Official Acts." Approved April 5, 1872. In force July 1, 1872.

IOWA, section 197 repeals the following enumerated sections of Title 15, Chapter 3 of the Code; sections 3043, 3045, 3049, 3050, 3051, 3052, 3054 and 3055.

KANSAS, section 199 repeals sections 540-557A of Dasser's General Statutes of 1901, and all acts and parts of acts in conflict herewith.

KENTUCKY, section 195 repeals all laws inconsistent with the act.

LOUISIANA, statute contains no express repeal.

MARYLAND, Laws 1898, c. 119. No express repeals.

MASSACHUSETTS, Acts and Resolves 1898, c. 533, repeals (§ 197) all inconsistent acts and parts of acts.

MICHIGAN, section 192 repeals all acts and parts of acts inconsistent with the foregoing provisions of the act.

MISSOURI, section 197 repeals all acts and parts of acts inconsistent herewith.

MONTANA, section 197 repeals all acts and parts of acts in conflict herewith.

NEBRASKA, section 197 repeals the original chapter of the Compiled Statutes of Nebraska for 1903.

NEVADA, section 197 repeals all acts or parts of acts inconsistent with or repugnant to the provisions of the act.

NEW HAMPSHIRE, section 196 repeals all acts and parts of acts inconsistent with the act.

NEW JERSEY, section 197 repeals of the laws enumerated in the schedules thereto annexed that portion specified in the last column (schedule is omitted in the laws as published).

NEW MEXICO, section 197 repeals all acts and parts of acts in conflict herewith and all acts relative to negotiable instruments.

NEW YORK, Laws 1897, c. 612 (Amendments, Laws 1898, c. 361), repeals (Schedule following section 341):

| | | |
|--------------------------------|------|---|
| R. S., pt. II., Ch. 4, tit. II | All | Bills and notes. |
| Laws 1835 141 | All | Notice of protest; how given. |
| 1857 416 | All | Commercial paper. |
| 1865 309 | All | Protest of foreign bills, etc. |
| 1870 438 | All | Negotiability of corporate bonds; how limited. |
| 1871 84 | All | Negotiable bonds; how made non-negotiable. |
| 1873 595 | All | Negotiable bonds; how made negotiable. |
| 1877 65 | 1,3. | Negotiable instruments given for patent rights. |

| | | | | |
|--------|-------|-----|-----|---|
| . 1887 | | 461 | All | Effect of holidays upon payment of commercial paper. |
| 1888 | | 229 | All | One hundredth anniversary of the inauguration of George Washington. |
| 1891 | | 262 | 1. | Negotiable instruments given on a speculative consideration. |
| 1894 | | 607 | All | Days of grace abolished. |

NORTH CAROLINA, Pub. Laws 1899, c. 733, repeals (§ 197) all laws and parts of laws in conflict with the provisions of this act. The same section also provides: "That nothing in this act shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this act; but the mention of such provisions in such instrument shall not affect the other terms of such instruments or the negotiability thereof, the laws now in force with regard to days of grace shall remain in force and shall not be repealed by this act."

NORTH DAKOTA, Laws 1899, c. 113. No express repeals.

OHIO, section 3178 c, subdivision 2, repeals the original sections 3171, 3172, 3173, and 3174, and original sections 3175, 3176, and 3177, as amended March 12, 1896 (92 Ohio Laws 61-62), and original section 3178 of the Revised Statutes of Ohio.

OKLAHOMA, section 190 repeals all acts and parts of acts in conflict herewith.

OREGON, Laws 1899, p. 18, repeals (§ 193) all inconsistent acts or parts of acts.

PENNSYLVANIA, section 197 repeals all acts and parts of acts inconsistent herewith.

RHODE ISLAND, Laws 1899, c. 623, p. 24, repeals (§ 8) sections 4, 5, 7 and 9 of Chapter 166 of the General Laws.

TENNESSEE, Laws 1899, c. 94. No express repeals.

UTAH, Laws 1899, c. 83, repeals (§ 197) title 46 Revised Statutes 1898, being sections 1553 to 1665 inclusive, and all other conflicting acts.

VIRGINIA, Acts Assem. 1897-98, c. 866, repeals (§ 197) all conflicting acts and parts of acts. This section also provides that

“Of the laws enumerated in the schedules hereto annexed, that portion specified in the last column is repealed,” but no schedule is annexed and the act is defective in this respect.

WASHINGTON, Laws 1899, c. CXLIX, repeals (§ 197) all inconsistent acts and parts of acts.

WEST VIRGINIA, in section 197 it is provided that section 9 of Chapter 99 of the Code of West Virginia and all acts and parts of acts in conflict herewith are hereby, to that extent, repealed.

WISCONSIN, Laws 1899, c. 356, repeals (2 immediately following section 1684-6) all inconsistent acts.

This section also repeals sections 176, 1675, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, of the Revised Statutes of 1878. Sections 1676, 1944, 1945, 4143, 4194, 4425, and 4458, are not affected by the act, being expressly saved from repeal. Sections 1944 and 1945 just referred to are considered on pages 44 and 239 of this work, and sections 1676, 4194 and 4425 are considered on page 47 of this work.

Section “4133” as it is printed in the act is probably a mistake, the section meant being 4193 which provides: “In all actions brought on promissory notes, or bills of exchange, by the indorsee, the possession of the note shall be presumptive evidence that the same was indorsed by the persons by whom it purports to be indorsed.”

Section 4458 provides that “Any person who shall fraudulently affix to any instrument or writing purporting to be a note, draft, or other evidence of debt issued by any corporation, a fictitious or pretended signature, purporting to be the signature of an officer or agent of such corporation, with intent to pass the same as true, it shall be deemed a forgery, though no such person may ever have been an officer or agent of such corporation, nor such corporation ever have existed.”

WYOMING, section 197 repeals all acts and parts of acts in conflict with the provisions of this act.

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